(6) No. 99-5746

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In The

Supreme Court of the United States

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
VOLUME II, PAGES 189 TO 378

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194 pp

TABLE OF CONTENTS

Page

Volume I

Lower Court Docket Entries 1

Defendant's Proposed Voir Dire Questions filed 10/8/93..... 9

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/15/93..... 13

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/18/93..... 17

Defense Exhibit B filed 10/18/93 66

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/20/93 Testimony of Luther J. Waddell..... 72

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/20/93..... 80

Guilt Phase Verdict Form Filed 10/21/93 84

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/21/93..... 85

Testimony of M. W. Casey..... 89

Testimony of Ralph Marshall 94

Testimony of Jeanette A. Galbraith..... 97

Testimony of Douglas Buchanan 100

Testimony of Linda Cavazos..... 102

Testimony of Lonnie Weeks, Jr..... 104

Testimony of Bennie House..... 130

Testimony of Tony McBride..... 136

TABLE OF CONTENTS – Continued

Page

Testimony of Sean Beaman 139

Testimony of Renee Rogers 142

Testimony of Juaneza Vivian..... 145

Testimony of Olden Bryant 151

Testimony of Trina Hammond 156

Testimony of Donny M. Dees..... 162

Testimony of Evelyn Leach 166

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/21/93 Testimony of Lonnie Weeks, Jr. 182

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/22/93..... 184

Volume II

Instruction No. B1-Denied 189

Instruction No. C1-Denied 190

Instruction No. 1-Granted..... 191

Instruction No. 2-Granted..... 192

Instruction No. 3-Granted..... 194

Instruction No. B1-Granted 195

Sentencing Verdict Forms..... 196

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/22/93..... 199

Jury Questions filed 10/22/93 217

TABLE OF CONTENTS – Continued

Page

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/22/93..... 218

Sentencing Verdict Form filed 10/22/93..... 228

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 1/13/94..... 229

Assignments of Error and Designation of Record filed in the Supreme Court of Virginia..... 232

Motion to Exceed Page Limit for Brief filed in the Supreme Court of Virginia on May 11, 1994 240

Brief Filed with the Supreme Court of Virginia in Non-Compliance with Page Limit on May 11, 1994..... 242

Order from the Supreme Court of Virginia Denying Motion to Exceed Page Limit for Brief entered May 27, 1994..... 247

Assignments of Error and Questions Presented from the Brief Filed with the Supreme Court of Virginia in Compliance with Page Limit..... 248

Statement of Facts From Brief Filed with the Supreme Court of Virginia in Compliance with Page Limit... 265

Principles of Law, Argument, and Authorities From Brief Filed with the Supreme Court of Virginia in Compliance with Page Limit..... 267

Weeks v. Commonwealth, 450 S.E.2d 379 (1994) 272

Petition for Writ of Habeas Corpus filed in United States District Court for the Eastern District of Virginia on 2/7/97 297

Brief of Appellant filed in United States Court of Appeals for the Fourth Circuit on 10/13/98 304

TABLE OF CONTENTS – Continued

Page

Appellant's Reply Brief filed in United States Court of Appeals for the Fourth Circuit on 12/17/98... 315

Motion to Recall Mandate filed in United States Court of Appeals for the Fourth Circuit on 7/22/99..... 323

Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999) 327

Order From United States Supreme Court Granting Leave to Proceed In Forma Pauperis..... 378

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

[Instruction Denied By Court]

JURY INSTRUCTION B1

EVIDENCE IN MITIGATION

Mitigation evidence is not evidence offered as an excuse for the crime of which you have found defendant guilty. Rather, it is any evidence which in fairness may serve as a basis for a sentence less than death. The law requires your consideration of more than the bare facts of the crime.

Mitigating circumstances may include, but not be limited to, any facts relating to defendant's age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating or tend to reduce his moral culpability or make him less deserving of the extreme punishment of death.

You must consider a mitigating circumstance if you find there is evidence to support it. The weight which you accord a particular mitigating circumstance is a matter of your judgment. ~~However, you may not refuse to consider the evidence that has been presented in mitigation.~~

[Last Sentence Deleted By Trial Court Judge]

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

[Instruction Denied By Trial Judge]

JURY INSTRUCTION C1

Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the Defendant to life in prison.

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

INSTRUCTION NO. 1

You are the judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

INSTRUCTION NO. 2

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than $100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

INSTRUCTION 3

"Aggravated battery" means a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

JURY INSTRUCTION B1

EVIDENCE IN MITIGATION

Mitigation evidence is not evidence offered as an excuse for the crime of which you have found defendant guilty. Rather, it is any evidence which in fairness may serve as a basis for a sentence less than death. The law requires your consideration of more than the bare facts of the crime.

Mitigating circumstances may include, but not be limited to, any facts relating to defendant's age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating or tend to reduce his moral culpability or make him less deserving of the extreme punishment of death.

You must consider a mitigating circumstance if you find there is evidence to support it. The weight which you accord a particular mitigating circumstance is a matter of your judgment.

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

_____

FOREMAN

_____

PRINT FOREMAN'S NAME

Commonwealth of Virginia

vs.

Lonnie Weeks, Jr.

Criminal Number 33170

October 22, 1993

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that

would constitute a continuing serious treat [sic] to society,

and

having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and/or aggravated battery and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

_____

FOREMAN

_____

PRINT FOREMAN'S NAME

Commonwealth of Virginia

vs.

Lonnie Weeks, Jr.

Criminal Number 33170

October 22, 1993

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having considered all of the evidence in

aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

FOREMAN

PRINT FOREMAN'S NAME

Commonwealth of Virginia

vs.

Lonnie Weeks, Jr.

Criminal Number 33170

October 22, 1993

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life and a fine $_____.

FOREMAN

PRINT FOREMAN'S NAME

Commonwealth of Virginia

vs.

Lonnie Weeks, Jr.

Criminal Number 33170

October 22, 1993

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

[8] accordingly.

Now, ladies and gentlemen, you have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life, or to imprisonment for life and a fine of a specific amount, but not more than $100,000.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt, at least one of the following two alternatives: one, that, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or two; that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhumane, in that it involved depravity of mind and aggravated battery to the victim, beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death; or, if you believe from all the [9] evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment, or imprisonment for life and a fine of a specific amount, but not more than $100,000.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment, or imprisonment for life and a fine of a specified amount, but not more than $100,000.

"Aggravated battery" means a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder.

Now, mitigation evidence is not evidence offered as to an excuse for the crime of which you have found the defendant guilty, rather, it is any evidence which in fairness may serve as a basis for a sentence less than death.

The law requires your consideration of more than the bare fact of the crime.

Mitigating circumstances may include, but are not to be limited to; any facts relating to the defendant's age, character, education, environment, life and background, or any aspect of the crime itself, which [10] might be considered extenuating or tend to reduce his moral culpability, or make him less deserving of the extreme punishment of death.

You must consider a mitigating circumstance if you find there is evidence to support it. The weight which you accord a particular mitigating circumstances, [sic] is a matter of your judgment.

Mr. Willett?

MR. WILLETT: Your Honor, with the Court's permission I'd like to give the opening portion, and Mr. Ebert would like to reply.

THE COURT: All right, sir.

MR. WILLETT: Thank you.

THE COURT: Thank you.

MR. WILLETT: When a crime so singular and profound, such as this, has been executed, and the last shot has echoed into the dark coldness, the effects of that crime ripple from that place of death, like the waves of an earthquake from its epicenter.

Those waves have rippled through and destroyed countless lives.

The victims of Lonnie Weeks' crimes are nameless and they are faceless. They are the young people [11] to whom he sells drugs in North Carolina; they are the State Troopers who are here and who are on the streets, even now, for our protection, who have been profoundly and deeply damaged by the acts of the defendant.

His victims fill this Courtroom, on both sides of the isle. No one, more deeply damaged then Mrs. Cavazos and Ms. Leach.

And what is his reason for doing this? Why did this happen? That is the question which pierces this trail like the blade of a knife.

Why did he have to do it? Why didn't he just get out of the car when Jose Cavazos politely asked him to do so, leaving the gun there?

Why didn't he say to him, Trooper, there's a gun in the car, and I know I'm not supposed to have it? Why did he fire upon him?

Is the answer because an evil spirit had taken over him, or is the answer that he acted as he has always acted, since he left the good influences of his grandmother; in his own, selfish interest?

Did he take the life of Jose Cavazos because he was possessed demonically, or was it because he was riding in a stolen car, because he had committed burglary, [12] because he had a weapon that had been used in a murder with him, and because he knew he was violating his probation?

The answer to the question, ladies and gentlemen, is clear. He killed Jose Cavazos because it was good for him to do it. It would help him, or so he thought, and no other reason.

And it is because of that, that the death penalty is the only appropriate sentence in this case.

If he had gotten on the witness stand and told you the truth, perhaps a life sentence would be appropriate. Him getting on the witness stand was a very shrewd defense tactic. You had found him guilty of capital murder. You are saying to him, we are convinced beyond all reasonable doubt that you committed this crime.

He's got nothing to lose by getting on the witness stand, after that, and saying, sure, I did it, and here's how it happened, and here's why it happened, and I'm deeply sorry for what happened.

But even yesterday, when he was cross-examined by Mr. Ebert, he couldn't face you with the truth. He told us he wasn't going to shoot Detlow. He was going to wait for the drug dealer Detlow to shoot at him, first.

• • •

[14] than there is in it.

There is panic and fear all around, and he stops to pick up and examine a piece of paper.

An evil spirit took over me. Why couldn't he tell us the truth yesterday? If he wants mercy, and his lawyers are going to use that word, shouldn't he be truthful with us first?

What happened? They came down this road, and you know (indicating) they came up this ramp, and the killing took place, and who drove away? That man (indicating). That was the man that had the presence of mind to drive away, not Mr. Dukes.

And up they came, when all of a sudden they've got a big problem, because there are two documents at that scene, we now know from his testimony, which can identify them.

Mr. Dukes' driver's license, and the paper – we still don't know what that paper is – that Mr. Dukes reached over and took out of the glove compartment, and gave to the Trooper. Both of those are on the ground back at the scene.

And so, Mr. Weeks stops the car. He takes the gun which he can't keep on his person anymore, because we

• • •

[16] arrive, and you heard the testimony. Police were being sent up in all different directions. The more the Police came on the scene, the more he had to secret himself, and so he did, back through the woods.

If it were not for Officer Virgil, they would have gotten back in that car, and they would have been gone, and we would never know who killed Jose Cavazos.

Do not think for a minute that he was truthful with you when he told you that he went back there to help. He went back there for the same selfish reasons that he's done everything since leaving Ms. Leach's home.

Why did he sell drugs? Well, he says it was for his children. Why didn't he get a job and keep it? He told Mr. Ebert he left all the jobs that he had, voluntarily.

If he is such a good family man interested in his children, why does he impregnate one woman, leave her; impregnate another one, leave her; start dating the third, no child support, except monies here and there, didn't marry. Self-interest; lies.

And because of that, because he would come into this Courtroom, and still calculate, and still play on emotions, and still cover up evidence, then he is the [17] type of person who is so dangerous that the death is warranted for that.

Look at the opportunities he's had in his lifetime. The defense, in their opening, portrayed him as coming from a disadvantaged background, and that is true. But it was a background with character, a background really, that while not having the financial support that it should have had, was as fine a home as any of us grew up in.

Mrs. Leach gave him the things he needed as a young man; love, faith, support. His actions betrayed her as they do Mrs. Cavazos.

He had the support of the mentor across the street, Sergeant Major Retired, a fine man, a man who cared about him. He had a coach who cared about him. He had a sister who cared about him, and by the way, why isn't she a criminal? If his background caused him to be a criminal, why isn't his sister a criminal? Why is she an upstanding citizen?

The coach, Sunday school counselor. All the fittings to nurture a heart were there for him, and don't let the defense tell you because he grew up poor, that that is an excuse for what he did.

[18] Most poor people, almost all poor people, believe in the law and support it, and they don't break it.

If his poverty is an excuse for his crime, then our system of justice needs to be changed.

Judge Whisenant has told you something about the law which we will get to very briefly, but I want to touch on all the mitigation evidence that you've heard about what he was like as a young man; a basketball star, there were pictures – they even introduced pictures of his children. We could have introduced pictures of Jose's children, too, but that's not what this case is about.

All of these people told you what he was like when he was young. None of them could tell you what he was like now, and I was struck by the similarity of the statements which the different witnesses made.

Ms. Vivien said, when she learned about the offense which Mr. Weeks had executed, "This couldn't be the Lonnie I used to know."

Donnie Reece, from his church, said, "I couldn't believe it was the Lonnie I once taught in Sunday school." Perhaps, most tragically, Mrs. Leach said, "I couldn't believe this was Lonnie, the boy I knew, that I [19] raised."

The boy that she knew and she raised is no longer among us. He disappeared many years ago, and he has been replaced by a man who would commit a crime such as this.

The law Judge Whisenant has told you about. The Commonwealth has to establish to your satisfaction either one of two things.

First, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

His testimony yesterday, his deviousness, and his purpose, which was to mislead you, is the most compelling evidence of his continued threat to society.

Forget all the crimes he's committed in the last – well, he's only been out of High School for a couple of years, a year and a half, but look what he's done.

He's been busy. He's done just about every crime you can think of, with the exception of rape. Is there anything that is beyond him? Can you think of a crime that this man would not commit, given the year and a

* * *

[22] about the trial, and pretends it just didn't happen.

He wants one thing; he doesn't want his father's death to be a waste.

I say to you, ladies and gentlemen, that if you take this opportunity to let them know that you're behind them, then his death will not have been a waste, and we can say there was some good which came from it.

Mr. Ebert and I ask you to impose the most serious penalty that the law allows, for this most serious of crimes.

Thank you, very much, for your kind attention throughout this long trial.

THE COURT: Thank you, very much.

Mr. Baker?

MR. BAKER: Ladies and gentlemen of the jury, I stand before you, in this most important matter, to argue that my client should receive a penalty of less than death, because that's what this trial has boiled down to; life or death.

Now, ladies and gentlemen of the jury, Mr. Willett has alluded in his opening statement the things that I am supposed to say here.

Well, ladies and gentlemen, some of these

* * *

[37] The defendant tried to explain this, that the only reason that he could understand why he did this thing, is that he got out of touch with God, and that's all he could explain how he could commit these evil acts.

Now, this defendant, ladies and gentlemen, is deeply – was religious, and I believe is now. He's tried to explain that the only reason that he can understand that would cause him to do these things.

Now, how do you know he was deeply religious? You got the testimony of Mr. Bedes, who was the Sunday school teacher, saying that he became moved so much in church that he had occasion to cry because of the Scripture.

Now, the defendant says he got out of touch with the Lord, and that was the result. I think, ladies and gentlemen of the jury, there was some justification for the defendant saying that. You have evidence before you that this man regularly attended church. He did so up until he graduated from High School.

You have evidence that he was sincere when he went to church. You have evidence that this individual grew up in a neighborhood that was not the best.

From the testimony of the detective, or I [38] believe the investigator, Narcotics Investigator from Fayetteville, this is a terrible area. There is drugs, there is shootings.

Now, the defendant lived there. He went to church, and he stayed out of trouble as long as he went to church. That's uncontested.

So, if there ever was an advertisement for church attendance, probably this case is it, because this defendant, as long as he went to church, he could resist the temptations around him.

We've heard all kinds of testimony concerning this neighborhood that he lived in, and yet, until he got

arrested for marijuana, after he graduated from High School, the defendant had no prior record.

Now, he got on the stand. He's told you that if he could die and bring Trooper Cavazos back from death, he would do it. Then he put a provision, which of course the Commonwealth will bring up, if he could go to heaven.

Now, perhaps it would have been much better, and much more self-serving, for this defendant to tell you, well, I'd die to bring him back, if I could bring him back, even if I went to hell. He's a Christian, and he can't say, but that was the truth as he saw it.

* * *

[40] old. His twenty-first birthday came, I believe, in July of this year, after this, making him twenty years old at the time he committed this offense.

Now, for eighteen years this defendant lived a very good life, considering the neighborhood that he grew up in, considering the temptations that he was faced with, he stayed out of trouble.

I would submit to you, from all the testimony that you heard, where he grew up, he was an exception to the rule.

Then what happened? Well, he went away from the church, and he went away from school, and he started hanging around with the wrong people. Now, that doesn't justify this. It doesn't justify it at all, because everybody has the right to make that decision. He had the right to make the decision who he hung around with.

However, he hung around with people like Luther Waddell, and as the retired Sergeant Major, Mr. O'Brien testified he tried to get him out of there.

Mr. Willett stated, quite correctly, that the defendant did have people that cared about him. He did. He had a grandmother that raised him and his brother, and worked hard all her life.

[41] Mr. Willett also said, and we don't disagree about this, how she feels. She got on the stand. She told you that she felt angry when she learned this had happened.

However, one thing in Lonnie Weeks' life did happen to him, and that was he was abandoned by his mother, who left him and his brother at the house of his grandmother and left, abandoning him.

The testimony is his mother is a drug addict. She wouldn't even bother to come by and see him. The testimony from his sister, no matter how good that he did, how outstanding a basketball player he was, his mother wouldn't even come to see his games.

The testimony from his grandmother was that his mother knows about this, and she hasn't even bothered – hasn't even bothered to come by the house, even though she knows her son is on trial for his life.

She did not appear as a witness. As his grandmother said, she can't be found.

Well, I submit to you, ladies and gentlemen of the jury, that it did have an impact on this defendant.

Now, we brought in a lot of witnesses, and the Commonwealth has alluded to this. Everyone of those [42] witnesses testified they never knew Lonnie to commit a violent act, never knew him to get in fights, and that they were totally shocked, totally shocked when they learned about this.

All of them came up here from North Carolina to give testimony in his trial, knowing what he had done.

The papers will show that Lonnie Weeks was an athlete of considerable promise, all of which has been totally wasted by him. Totally wasted; it's absolutely terrible.

Now, ladies and gentlemen of the jury, there can be no justification for murder. There can particularly be no justification for the murder of a State Trooper; however, when you decide on your sentence in this case, you do have two alternatives; life or death.

I would ask you to consider that for eighteen years this was a pretty decent person, that he stayed out of trouble for that long, under difficult circumstances.

Then, as he said, he got out of touch with the Lord, and he is a religious man. There are many who find religion in the jail. They become converted prior to coming to Court, prior to sentencing. Then they usually leave it after sentencing.

[43] Lonnie Weeks is not such a person. He had a religious background, and he was deeply moved. He has sinned. He has sinned. He does not deny that he has sinned, grievously, he has sinned.

He believes that if his soul is right he might go to heaven and that's what he wants. Now, ladies and gentlemen, I submit to you that is really what the Christian religion is about.

The Commonwealth had alluded to you, in order to sentence this – fix this defendant's sentence of death, you must find two things, and that is that –

MR. WILLETT: Excuse me, Judge. I hate to interrupt, but it would be either one of the things, not two things.

MR. BAKER: You're correct, Mr. Willett.

MR. WILLETT: Thank you.

MR. BAKER: I made a mistake. There are two factors you can consider, either one of which would justify a death sentence, and that is after considering his criminal history and background, there is a probability that he would constitute a continuing serious threat to society.

Or, that his conduct in committing the offense [44] was outrageously wanton and vile, or inhumane, it involved depravity of mind, or aggravated battery to the victim, beyond the minimum necessary to accomplish the act of murder.

Prior to this offense, the defendant had one conviction. Now, he committed a bunch of other offenses, and you can consider that. Now, you could still find that he meets both of these criterias, and not sentence him to death.

I believe you will read that in the instructions. Now, ladies and gentlemen, I stand before you, humbly. This defendant admits that he has committed a terrible crime. He has admitted that he has killed an innocent man. He has tried to tell you, although the Commonwealth will say it's a bunch of self-serving lies, what happened.

Now, ladies and gentlemen, he never said, an evil spirit. He tried to explain, but that was the Commonwealth's words. That was not his.

When he was being asked he tried to explain something that he has great difficulty in his own mind explaining, and I hope you understand that when you decide.

[45] You saw him on the stand, ladies and gentlemen, you saw him. I submit to you, ladies and gentlemen, you have a person who is repentant. You have a person that is trying to find God again, although this is a terrible thing to have to do, under the circumstances.

And, again, ladies and gentlemen of the jury, the issue is whether you should sentence this defendant, Lonnie Weeks, Jr., to death, or you feel from the evidence, and the Judge has given you an instruction with respect to what you can consider, that he deserves the other alternative, which is life.

Ladies and gentlemen of the jury, I want to thank you for your attention, before I leave, and I pray, ladies and gentlemen of the jury, that you will return a sentence of life in this case.

Thank you.

THE COURT: Thank you, Mr. Baker. Mr. Ebert?

MR. EBERT: Ladies and gentlemen, it's been a long week for you, and for all of us, and I know it's been a real strain. Again, I want to thank you for being here, and for being so attentive to the evidence that you've heard.

What I say to you, as counsel told you, is not [46] evidence. You've heard the evidence and you folks are going to have to determine what the appropriate punishment is in this case.

I take no pleasure in asking you to impose the death penalty. We have the death penalty and you don't have to impose it, but all of you have taken an oath that you can consider both options.

I would say to you folks that if you're going to have the death penalty, this case is the type of case that it's designed for. Now, why do I say that? Because we have to look at the defendant as you saw him today, and as he was on the day that this crime was committed.

There is no question about the fact, back when he was in High School, there is no evidence before you, that he was dangerous, that he had turned to a life of crime. That's not what we're dealing with here, folks. You're dealing with what we've got here today.

It's been pointed out earlier; he had every advantage – I won't say, every advantage, but many advantages that other people don't have. Sure, his parents – one died and the other one left him. One was a drug user, couldn't stand it, according to his grandmother, but this man didn't use drugs. This man sold [47] drugs for profit. That

is the testimony and it's uncontradicted testimony before you. This man is greedy. This man is selfish.

That's what you have before you. He told you; he wanted money, and that's why he did what he did. That's why he sold drugs, that's why he broke in Mr. Farmer's house, that's why he stole his car.

Everything that he has done throughout this trial, I would submit to you, is an attempt to mitigate what might happen to him. He lied from the onset, throughout, to the Officer. And why? Because he was selfish and he didn't want to get caught and he didn't want to admit it.

Once he got – he felt that the evidence was overwhelming, he changed his story a little bit. Then, he got on the stand yesterday, folks, and he told you certain things for one reason and one reason alone, and that was to mitigate the punishment that you're entitled to impose on him, that you've sworn to consider, under the law.

I say to you if you believe what he said on the stand yesterday, sentence him to life. If you don't, and you believe that the type of person that he is, that he was trying to serve himself, I say sentence him to [48] death, but you folks be the judge of that.

Counsel says to you there is no evidence that he murdered anyone in North Carolina. There is not, but he knew that gun had been used in a murder. He had already turned to a life of crime. He wanted a gun, and he got that gun in order to aid the person who had been suspected of the murder, and did not want that weapon in their possession.

And he got it for the purpose of killing another human being. That's why he had it. He tells you, I didn't reload it, Luther Washington (sic) reloaded it. He knew Luther Washington reloaded it, and he knew how many shells and bullets were in that gun. He knew what hollow bullets were. He knew what a 380 was.

He'd tell you, well, I really wasn't going to kill Detlow, unless he tried to kill me. That's not what Luther Washington said, and in any event, he armed himself, as it was pointed out to you, if he wasn't selling drugs, he wouldn't have gotten involved with Detlow to start with, and he wouldn't need to have that gun.

If he weren't going to kill Detlow or use it to take another person's life, why are they passing it

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

[Questions And Answers Handwritten In Original]

Question: (1) Does the sentence of life imprisonment in the State of Virginia have the possibility of parole and if so under what conditions must be met to receive parole.

Answer: You should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

Question: If we believe that Lonnie Weeks, Jr., is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty on one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule please clarify.

Answer: See second paragraph of Instruction #2 (Beginning with "If you find from. . . .

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

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[56] It dwelt within him when he sold drugs. It dwelt within him when he broke in a helpless man's home and took his belongings. It dwelt within him with he took his car.

Luther Washington (sic) told you why he was going to Washington, to sell it; and I say that's credible.

Now, what's incredible, to me, and you be the judge of it; he tells you, I'm going to bring the car back and park it. The man stole everything he had inside and ransacked the house, he's going to sell the television, stereo, get the money that he wanted so badly, and he says, oh, I'm going to take it back. I was just taking it for a little joyride, up to visit my relatives.

Folks, I say that's baloney. That's the person you're dealing with.

Everything he does is calculated for his self interest. What so tragic about it, and God knows nobody likes to come out of poverty. He didn't have to be that way. He had jobs. The system, the judicial system such as we've had, gave him an opportunity; putting him on probation.

And the Judge, no doubt, heard every word you heard yesterday in mitigation, what a nice fellow he was,

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[59] Thank you.

THE COURT: Thank you, Mr. Ebert.

Ladies and gentlemen of the jury, at this time you will be given the instructions that I have read to you, the Exhibits that have been placed in evidence, and you may and begin your deliberations.

Please go with the Bailiff at this time.

(Whereupon, at approximately 10:40 o'clock a.m, the jury retired from the Courtroom to begin their deliberations.)

THE COURT: The Court will be in recess until the jury returns.

(Whereupon, the Court stood in recess until 12:00 p.m.)

THE COURT: Counsel, I have received a question from the jury. The question is, "Does the sentence of life imprisonment in the State of Virginia have the possibility of parole, and if so, under what conditions must be met to receive parole?"

I have responded by saying, "you should impose such punishment as you feel is just under the evidence, and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards."

[60] MR. BAKER: Your Honor, I'll object to that instruction, and I would request instruction with respect that they should presume that their sentence will be carried out.

THE COURT: I'll deny that request. This is the standard instruction that is to be given to the jury from the model jury instructions. Your exception will be noted.

Mr. Ebert, do you want to be heard?

MR. EBERT: Counsel, that's simply not the law. It would be improper to instruct them that they should presume that their sentence would be carried out. If they, in fact, would sentence him to life, he would be eligible for parole, so if that's the standard instruction, I ask the Court to give it to them.

THE COURT: All right, sir.

MR. BAKER: Note my objection, please, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution.

THE COURT: They will be so noted, and as Mr. Ebert has indicated, I don't think one; that's the law, and two, that's certainly not the model instruction that should be given.

[61] The Court will be in recess until the jury returns.

(Whereupon, the Court stood in recess.)

(Whereupon, at approximately 12:40 o'clock p.m., the jury entered the Courtroom and resumed their seats in the jury box.)

THE COURT: You may have a seat, if you would, please, ladies and gentlemen.

(Whereupon, the jury complied with the request.

THE COURT: Ladies and gentlemen, I called you back just to simply advise you that the Court is going to be taking a one-hour luncheon recess. It's twenty minutes to one.

The reason I am doing that is I have a two o'clock docket that I must meet this afternoon. Now, if you wish to go to lunch you may. I've been advised that someone has indicated to the Bailiff that you may wish to continue with your deliberations during lunch.

You certainly may do that, as well, but I also was advised that you would like to have some drinks, and send someone down for drinks and coffee. That's fine also. Just remember, you may not do any deliberation [62] unless all of you are in the deliberation room at the same time, so if one or two of you, or three of you go down to get coffee and drinks, and you wish to deliberate straight through lunch, that's certainly fine, as long as there is no deliberation by any of you, and no discussions whatsoever, unless all twelve of you are in the jury deliberation room at the same time.

The Court is going to take luncheon recess. It's twenty minutes to one. I'll be back at twenty minutes till two. As I said, I have a two o'clock docket; however, if there are any questions that you may have, or any reason, I'll certainly be responding to them immediately.

I will stop my two o'clock docket to accommodate whatever I may have to with you, but I do want you to know that we are going to lunch. If you wish to go to lunch that's up to you.

I understand that you may not, from what the Bailiff has indicated, but I will let the jury make that decision. So, at this time, the Court is in recess for one hour.

Let me simply advise you that if you do go to lunch, apart from those of you who may go downstairs to [63]

get coffee or drinks, or whatever, please do not discuss this case with one another unless all of you are in the jury deliberation room deliberating.

Please do not stay within the hearing of anyone that may be discussing this matter. If you do decide to deliberate straight through, and you're just going to send one or two of you downstairs, the Bailiff will assist the individuals going down, so that you can get downstairs, get what you would like, and then get on back here. He will assist you.

So, at this time you may go with the Bailiff back to the deliberation room, or go to lunch, whatever you decide to do at this particular time.

(Whereupon, at approximately 12:45 o'clock p.m., the jury retired from the Courtroom.)

THE COURT: Counsel, the Court will be in recess until twenty minutes to two.

(Whereupon, the Court stood in recess until approximately 3:15 o'clock.)

THE COURT: Counsel, I have received a question from the jury. The question is as follows: "If we believe that Lonnie Weeks, Jr., is guilty of at least one of the alternatives, then it is our duty as a jury, to [64] issue," – and they have underlined the word, "issue," – "the death penalty? Or, must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty or one of the life sentences? What is the rule? Please clarify."

In instruction number 2 that was given to them, in the second paragraph, it reads, "If you find from the

evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two alternatives, and as to that alternative, you are unanimous, then you may fix the punishment of the defendant at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at imprisonment for life, or imprisonment for life with a fine not to exceed $100,000."

I don't believe I can answer the question any clearer than the instruction, so what I have done is referred them to the second paragraph of instruction number 2, and I told them beginning with, "if you find from," et cetera, et cetera, for them to reread that paragraph.

Does either counsel wish to be heard?

MR. EBERT: I think that's appropriate, Judge.

[65] MR. MORRISETTE: Could we just have a moment?

(Pause)

THE COURT: Counsel do you wish to be heard?

MR. MORRISETTE: Your Honor, we would ask that Your Honor instruct the jury that even if they find one or both of the mitigating factors – I'm sorry, the factors that have been proved beyond a reasonable doubt, that they still may impose a life sentence, or a life sentence plus a fine.

THE COURT: That's exactly what that paragraph does, counsel. You're just asking me to rephrase it in different language, and to give the same instruction

again. I do not think that would be appropriate to give the same instruction twice, just with different language.

I think that paragraph answers their precise question. I think they just have to be drawn to that paragraph to find their answer.

MR. MORRISETTE: Please note my objection, Your Honor.

THE COURT: It will be so noted.

The Court will be in recess until the jury returns.)

(Whereupon, the Court stood in recess.)

[66] THE COURT: Counsel, we have a verdict in this matter. The jury is coming back.

(Whereupon, at approximately 5:31 o'clock p.m., the jury entered the Courtroom and resumed their seats in the jury box.)

THE COURT: You may have a seat, if you would, please. (Whereupon, the jury complied with the request.).

THE COURT: At this time I will please ask the Clerk to read the verdict.

THE CLERK: Members of the jury, have you reached a verdict in the case?

FOREPERSON: Yes, we have, Your Honor.

THE CLERK: Is this your unanimous vote?

FOREPERSON: Yes, it is.

THE CLERK: In the case of Commonwealth of Virginia versus Lonnie Weeks, Jr., Criminal Number

33170, we the jury, on the issue joined, having found the defendant Lonnie Weeks, Jr., guilty of capital murder, and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhumane, in that it involved depravity of mind and or [67] aggravated battery, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death, signed David L. Dobyns, Foreman.

MR. MORRISETTE: Please poll the verdict – poll the jury.

THE COURT: At this time I will ask the Clerk to please poll the jury.

THE CLERK: As I call your name, members of the jury, please answer yes or no, as to your verdict in this case.

Jessica L. Nelson?

(Whereupon, a majority of the jury members are in tears.)

MS. NELSON: Yes.

THE CLERK: Joann Chappell?

MS. CHAPPELL: Yes.

THE CLERK: Brenda Barrett?

MS. BARRETT: Yes.

THE CLERK: Charlene Rogers?

MS. ROGERS: Yes.

THE CLERK: David Dobyns?

MR. DOBYNS: Yes.

THE CLERK: Thaddeus Trynock?

[68] MR. TRYNOCK: Yes.

THE CLERK: Sherrie Richardson?

MS. RICHARDSON: Yes.

THE CLERK: Juanita C. Ford?

MS. FORD: Yes.

THE CLERK: Beatrice Hayward?

MS. HAYWARD: Yes.

THE CLERK: Sandra E. Willis?

MS. WILLIS: Yes.

THE CLERK: Kent Painter?

MR. PAINTER: Yes.

THE CLERK: Thomas Boyer?

MR. BOYER: Yes.

THE COURT: Ladies and gentlemen, let me thank you for the time and effort that you've put into this matter. You are excused from any further jury duty for this term. At this time, if you will please go with the Bailiff.

(Whereupon, at approximately 5:30 o'clock p.m., the jury retired from the Courtroom.)

THE COURT: Any motions by counsel?

MR. BAKER: There would be a motion for a pre-sentence report.

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PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and/or aggravated battery and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

DAVID L. DOBYNS
FOREMAN

/s/ David L. Dobyns
PRINT FOREMAN'S NAME

Commonwealth of Virginia
vs.
Lonnie Weeks, Jr.
Criminal Number 33170

October 22, 1993

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

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[37] least as far as what the Court heard in the penalty phase witnesses, none of it had anything to do with the aggravated battery and depravity of mind vis-a-vis should the death penalty be imposed.

In mitigation, the defendant offered several witnesses, and I would just like to very briefly recount their testimony, which I believe, is substantial mitigation testimony, justifying a sentence of life in this matter.

If you recall, Coach House testified that he had coached Lonnie at Seventy First for, I believe, three years, that Lonnie always maintained control of himself. He never had any disciplinary problems with him. He was a leader on the team, and attempted to be an example to the younger players, that he never had been thrown out of a game for any reason, and to his knowledge, had not been in trouble in school.

He also testified that he noticed Lonnie, apparently, did have problems once he graduated. Coach House did not have regular contact with him, when Lonnie lost that regular contact with Coach House.

Sergeant Major Bryant had a very similar account, although he didn't coach Lonnie, he had known

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[42] commits a horrible crime, and then, once they get over to the jail, for the first time in their life they start going to a Bible study, and discover that if they just

accept Jesus Christ as their Savior, they are never going to commit a crime again, and therefore, they shouldn't be punished.

This is a young man who has had sincere, religious beliefs his entire life, and everything we know about this young man indicates that this violent act is a complete aberration, everything we know about his history.

As far as we know, all the evidence in the case, the Probation report, this is the only violent act there is any evidence that he has ever committed.

It is, therefore, not hard to believe that he, in fact, does sincerely hold these religious beliefs, and that he – in fact, when he says, a force come over him, that that is his best explanation.

Looking at his background, it's a sincere explanation.

Now, one thing I would like to point out is that the Commonwealth – all this evidence that we put on in the penalty phase of the trial, certainly, and everything seen in the Probation report, certainly [43] constitutes a great body of mitigation evidence concerning whether or not the death penalty should be imposed in this case.

The Commonwealth offered nothing to rebut any of this. There has never been any indication that Lonnie's religious beliefs are not sincere.

As Mr. Hefner says, everything Lonnie told him checked out, which was capable of being checked out.

The witnesses in the penalty phase, and all the people Mr. Hefner talked to, all would agree, that this offense

was completely out of character for Lonnie. They were all shocked.

I guess, at this time, I'd like to sum up, as best I can, from a little bit different point of view than Lonnie, the factors in this case, in addition to what I have already mentioned, that I think justify reducing the recommendation of the death penalty to a life sentence.

We have a young man who was raised in a religious home, that certainly, for the first eighteen, nineteen years of his life, was a very responsible, kind, caring young man, and family member, in spite of some setbacks he suffered; primarily, the loss of his parents.

He lost his father at a young age, to illness,

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VIRGINIA:

IN THE SUPREME COURT

Lonnie Weeks, Jr.,

Appellant,

v. Record No. 940335

Commonwealth of Virginia,

Appellee

ASSIGNMENTS OF ERROR AND DESIGNATION OF RECORD

COMES NOW the Appellant, Lonnie Weeks, Jr., and, pursuant to Rule 5:22 of the Rules of the Supreme Court of Virginia, files this, his *Assignments of Error and Designation of Record*, as follows:

Assignments of Error

Appellant makes the following assignments of error from the trial of this matter, upon which he intends to rely for reversal of the conviction and review of the sentence of death, to include all issues encompassed by each assignment:

1. The sentence of death in this case was imposed under the influence of passion, prejudice, or other arbitrary factor.

2. The sentence of death in this case is excessive or disproportionate to the penalty imposed in similar cases.

3. The trial court erred by refusing to order all the items requested in defendant's *Motion for Bill of Particulars*.

4. The trial court erred by refusing to order all the items requested in defendant's *Motion for Discovery and Inspection*.

5. The trial court erred by denying defendant's *Motion to Enjoin Law Enforcement Officers from Wearing Uniforms in Courtroom While Sitting as Spectators, or Grant Other Appropriate Relief*.

6. The trial court erred by denying defendant's *Motion to Disqualify Commonwealth's Attorney*.

7. The trial court erred by denying the defendant's request for the assistance of an expert investigator.

8. The trial court erred by denying the defendant's request to be heard *ex parte* on his motion for criminal records pursuant to § 19.2-389 of the Code of Virginia.

9. The trial court erred by denying the defendant's motion for criminal records pursuant to § 19.2-389 of the Code of Virginia.

10. The trial court erred by denying defendant's request to be heard *ex parte* on his motion for scientific testing pursuant to § 2.1-434.11 of the Code of Virginia.

11. The trial court erred by denying the defendant's request to be heard *ex parte* on his motion for expert assistance in the fields of pathology and ballistics.

12. The trial court erred by denying the defendant's pretrial request for expert assistance in the fields of pathology and ballistics.

13. The trial court erred by denying the defendant's renewed request for a *Bill of Particulars* pursuant to Virginia Code Section 19.2-399.

14. The trial court erred by denying the defendant's request for individual *voir dire* of jurors.

15. The trial court erred by denying the defendant's *Motion to Declare the Virginia Capital Murder and Death Penalty Statutes Unconstitutional and to Prohibit the Imposition of the Death Penalty on the Grounds that the Virginia Death Penalty Statutes Violate the Virginia and United States Constitutions*, which *Motion* cited and relied upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 8, 9 and 11 of the Constitution of Virginia.

16. The trial court erred by denying the defendant's *Motion to Compel Discovery*.

17. The trial court erred by denying the defendant's *Motion for Continuance* heard on October 14, 1994.

18. The trial court erred by denying the defendant's motion to suppress evidence obtained from him in violation of the Fourth Amendment to the Constitution of the United States.

19. The trial court erred by denying the defendant's motion to suppress evidence obtained from him in violation of the Fifth Amendment to the Constitution of the United States.

20. The trial court erred by denying the defendant's motion *in limine* to prohibit the introduction of evidence concerning unadjudicated acts of the defendant related to an alleged murder in North Carolina.

21. The trial court erred by denying the defendant's proposed *voir dire* questions (numbered 1 through 12) concerning bias of potential jurors against the defendant and in favor of imposing the death penalty.

22. The trial court erred by denying the defendant's proposed *voir dire* questions (numbered 15 through 26) which attempted to determine racial bias of potential jurors.

23. The trial court erred by denying the defendant's proposed *voir dire* question (numbered 44A) concerning potential jurors' belief(s) as to whether a life sentence would be carried out.

24. The trial court erred by denying the defendant's proposed *voir dire* question (numbered 45) concerning potential jurors' belief(s) as to whether a sentence of death would be carried out.

25. The trial court erred by denying the defendant's challenge for cause to juror Pama.

26. The trial court erred in admitting Commonwealth's exhibit 23A.

27. The trial court erred by admitting the hearsay statement of a co-defendant that the defendant shot the victim.

28. The trial court erred by admitting into evidence witness J. K. Roland's testimony that the defendant was not telling the truth and was lying when the defendant denied shooting the victim.

29. The court erred by admitting into evidence witness J. K. Roland's testimony that the defendant knew the victim could not see his hands.

30. The trial court erred by admitting testimony of Christopher Daniels that he had been threatened by "admirers" of the defendant.

31. The trial court erred by denying the defendant's motion for a mistrial based on the Commonwealth's mention of parole eligibility in the presence of the jury.

32. The trial court erred in admitting the testimony of Thomas Trochum concerning the characteristics of a bullet from an unrelated case in North Carolina.

33. The trial court erred in denying the defendant's motion to strike the Commonwealth's evidence on the offense of capital murder made on the grounds that the evidence was insufficient to prove the element of premeditation.

34. The trial court erred in denying the defendant's renewed motion for the appointment of a forensic pathologist and a ballistics expert to assist the defense, and to continue the matter to provide sufficient time for the defendant to effectively consult with and otherwise make use of such experts.

35. The trial court erred in refusing to give defendant's proposed instruction F to the jury or to otherwise fully and properly instruct the jury concerning the meaning of "willful, deliberate, and premeditated" in light of the nature of the offense charged, the evidence adduced at trial, and the law applicable thereto.

36. The trial court erred by denying defendant's renewed objection to admission of victim impact testimony at trial.

37. The trial court erred in permitting the admission at trial of evidence of the criminal records of individuals who allegedly conspired with the defendant to distribute marijuana.

38. The trial court erred in permitting the Commonwealth during cross-examination to question the defendant regarding the purported possession of a gun by the co-defendant, which gun was not connected in any way to the offense charged in this matter.

39. The trial court erred in permitting the Commonwealth to question the defendant regarding how many times he had talked with his attorneys about his testimony.

40. The trial court erred in refusing to give the jury defendant's proposed instruction A1 or to otherwise fully and properly instruct the jury regarding the proper meaning of "aggravated battery" in light of the nature of the offense charged, the evidence adduced at trial and the law applicable thereto.

41. The trial court erred in refusing to give the jury defendant's proposed instruction C1 or to otherwise fully and properly instruct the jury regarding their option to give effect to mitigating evidence by sentencing the defendant to life in prison even if they found one or all of the statutory "aggravating factors" beyond a reasonable doubt, in light of the nature of the offense charged, the evidence adduced at trial and the law applicable thereto.

42. The trial court erred in giving the jury finding forms which did not expressly provide a choice for a sentence of life imprisonment upon a finding of one or more aggravating factors.

43. The trial court erred in refusing, in response to a specific jury question regarding the possibility of parole, to instruct the jury that they were to presume their sentence would be carried out.

44. The trial court erred in refusing, in response to a specific jury request for clarification, to specifically instruct the jury that if they found one or more aggravating factors beyond a reasonable doubt, they could sentence the defendant to life in prison or to death.

45. The court erred in making the Victim Impact Statement a part of the record and considering it prior to sentencing the defendant.

46. The trial court erred in refusing to set aside the sentence of death after the consideration of the pre-sentence report and the good cause shown for setting aside the sentence of death at the sentencing hearing.

47. The trial court erred in denying the defendant's motion to set aside the sentence of death.

Designation of Record

Appellant designates the following as the parts of the record relevant and germane to the review and the assignments of error in this matter. References are to the *Table of Contents* in this matter filed by the Clerk of the trial court with the Clerk of the Supreme Court, except where otherwise noted.

1. Volume I, pages 1 through 255.

2. Volume II, pages 256 through 492.

3. Volume III, pages 493 through 747.

4. Volume IV, pages 748 through 869.

5. Commonwealth's Exhibit 1, filed 10/15/93.

6. Commonwealth's Exhibits 1, 2A, 2B, 3, 4A through 4Y, 5, 6, 7, 8, 9A, 9B, 9C, 10, 11, 12, 13, 14A through 14G, 15, 16, 17, 18, 19, 20, 21, 22, 23, 23A, 24A, 24B, 25, 26A through 26D, 27A, 27B, 28A, 28B, 29A, 29B, 29C, 30, 31A, 31B, 32, 33A, 33B, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, all filed 10/19/93.

7. Commonwealth's Exhibits 47, 48, 49, 50, 51, 52, all filed 10/20/93.

8. Defendant's Exhibit 1, filed 10/15/93.

* * *

VIRGINIA:

IN THE SUPREME COURT

LONNIE WEEKS, JR.

v. Record No: 94-335

COMMONWEALTH OF VIRGINIA

MOTION TO EXCEED PAGE LIMIT FOR BRIEF

COMES NOW LONNIE WEEKS, JR. by Counsel, and, pursuant to Rule 5:26 of the Rules of the Supreme Court, requests that the Court accept his [sic] to file his 102-page brief filed this day, and in support thereof states as follows:

1. This matter is an appeal of a capital murder conviction where a sentence of death was imposed.

2. Appellant has assigned 47 errors from the proceedings in the trial court; these errors have been assigned in good faith and not with any frivolous intent.

3. To require the appellant to limit his brief to fewer pages might cause him either to waive by default legitimate issues which should be addressed by this Court as a matter of due process or to reduce the effectiveness of his argument on the issues.

4. The Eighth and Fourteenth Amendments to the Constitution of the United States require a heightened level of due process and higher reliability in capital proceedings than in other criminal matter, due to the extreme nature of the penalty potentially to be imposed.

WHEREFORE, the appellant respectfully requests that the Court waive the page-limit for briefs and accept his brief as filed.

LONNIE WEEKS, JR.
By Counsel

/s/ Daniel J. Morissette
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(703) 369-6900
Counsel for Defendant

Certificate

I hereby certify that I have this 11th day of May, 1994, mailed by certified mail, postage prepaid, a copy of this motion to the Clerk of the Supreme Court of Virginia and the Office of the Attorney General of Virginia.

/s/ Daniel J. Morissette
Daniel J. Morissette, Esquire

SUPREME COURT OF VIRGINIA

[Caption Omitted In Printing]

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This court has held that "A killing inflicted by multiple gunshot wounds may constitute an aggravated battery" within the meaning of Va. Code Section 19.2-264.2 Where there is an appreciable lapse of time between the first shot and the last and death does not result instantaneously from the first" See *Barnes v. Commonwealth*, 234 Va. 130, 360 SE 2d 196 (1987) cert denied 484 U.S. 1036, 108 S Ct 763, 98 L Ed 2d 779 (1988).

Defendant's proposed instruction A-1 was the exact wording used by this court in *Barnes* to define how a murder inflected by means of multiple gunshot wounds could constitute an aggravated battery within the meaning of Va. Code Section 19.2-264.2 Defendant was entitled to a jury instruction which explained the law on an issue which was raised by the facts of his case. Failure by the trial court to give defendant's proposed jury instruction A-1 constituted prejudicial error with respect to the sentencing portion of his trial and constituted a violation of his rights under Article 1 Sections 8 and 11 of the Constitution of Virginia and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

41st Assigned Error

In a capital murder case, consideration of the character and record of the individual offender is indispensable in meeting the requirements of the Eighth Amendment. *Woodson v. North Carolina, supra.* In *Penry v. Lynaugh* the

Supreme Court stated that " . . . it is precisely because the punishment should be directly related to the personal culpability of the defendat [sic] that the jury must be allowed to consider *and give effect to* mitigation evidence relevant to a defendant's character or record or the circumstances of the offense." 492 U.S. 302, 327-328, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989) (emphasis added). The Court further stated, " . . . in the absence of instructions informing the jury that it could consider *and give effect to mitigating evidence . . . by declining to impose the death penalty,* we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to the evidence in rendering its sentencing decision. *Id.*, (emphasis added), quoting *California v. Brown*, 479 U.S. 538, 545, 93 L.Ed.2d 934, 101 S.Ct. 837 (1987) (O'Connor, J., concurring).

Instruction C1 was a correct statement of the law under *Penry*, was not needlessly redundat, [sic] and was materially vital to the defendant; it should therefore have been given to the jury by the court. *see Jimenez* and *Wade, supra.*

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

42nd Assigned Error

The statutory finding forms in Virginia do not expressly provide for a finding of one or both of the aggravating factors beyond a reasonable doubt and a

sentence of life imprisonment; they are therefore violative of the principle enunciated in in [sic] *Penry, supra.*

The court's error in failing to provide the jury with finding forms complying with *Penry* violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

43rd Assigned Error

It was obvious from the question presented by the jury that the jurors were considering extraneous matters which had not been raised either by the evidence or by the instructions given them. The only reference to parole heard by the jury occurred when the Commonwealth asked witness Daniels when he was eligible for parole, *Appendix*, 2267, after Daniels testified he had been sentenced to forty years, *Appendix*, 2257. Although the court instructed the jurors to disregard the question, *Appendix*, 2269, obviously the jurors did not do so. The jury wished to know how long the defendant would spend in prison if they awarded a sentence of life imprisonment and at least one or more of the jurors was considering an extraneous factor other than the law and evidence of the case. Various studies have shown that juror's beliefs concerning parole are often erroneous. *See The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989). The instruction given is inadequate to remind the jurors of their duties; indeed, the admonition "You are not to concern yourself with what happens afterwards" raises by implication that

something will happen afterwards to reduce a life sentence or reduce a death sentence. At a minimum, the jury should have been instructed that they should consider the two alternatives they had before them as being the punishment the defendant would receive. Defendant's proposed instruction that the jury should presume that their sentence would be carried out would have required the jury to consider the alternatives seriously without the extraneous factor of parole, which by the nature of the jury question had entered into their deliberations. A defendant should not be sentenced to death on the basis of information which he has no opportunity to deny or explain. *Skipper v. South Carolina*, 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986); *Gardner v. Florida*, 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977). The instruction proposed by the defendant in response to the jury's question is even less definitive than a similar instruction held to be constitutionally inadequate in a like situation. *See Simmons v. South Carolina*, 62 USLW 4509 (1994).

Denial of defendant's proposed instruction violated his rights under Article I, Sections 8 and 11 of the constitution of Virginia and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

44th Assigned Error

The defendant relies on the argument set forth under the *41st Assigned Error, supra,* in response to the question presented on this error.

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

45th Assigned Error

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

46th Assigned Error

The trial court's failure to set aside the sentence of death and impose a life sentence, in light of the evidence and argument at trial and at thhe [sic] sentencing hearing, where good cause was

* * *

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 27th *day of* May, 1994.

Lonnie Weeks, Jr., Appellant,

against Record No. 940335
Circuit Court No. CR33170

Commonwealth of Virginia, Appellee.

Upon an appeal of right from a judgment rendered by the Circuit Court of Prince William County on the 14th day of January, 1994.

On May 12, 1994 came the appellant, by counsel, and filed a motion to file an opening brief in this case in excess of the page limit.

On consideration whereof, the motion is denied. The appellant shall have 30 days from the date of this order to file an opening brief consisting of no more than 50 pages.

A Copy,
Teste:

/s/ David B. Beach
Clerk

VIRGINIA SUPREME COURT

[Caption Omitted In Printing]

• • •

ASSIGNMENTS OF ERROR

1. The sentence of death in this case was imposed under the influence of passion, prejudice, or other arbitrary factor.

2. The sentence of death in this case is excessive or disproportionate to the penalty imposed in similar cases.

3. The trial court erred by refusing to order all the items requested in defendant's Motion for Bill of Particulars.

4. The trial court erred by refusing to order all the items requested in defendant's *Motion for Discovery and Inspection*.

5. The trial court erred by denying defendant's *Motion to Enjoin Law Enforcement Officers from Wearing Uniforms in Courtroom While Sitting as Spectators, or Grant Other Appropriate Relief*.

6. The trial court erred by denying defendant's *Motion to Disqualify Commonwealth's Attorney*.

7. The trial court erred by denying the defendant's request for the assistance of an expert investigator.

8. The trial court erred by denying the defendant's request to be heard *ex parte* on his motion for criminal records pursuant to § 19.2-389 of the Code of Virginia.

9. The trial court erred by denying the defendant's motion for criminal records pursuant to § 19.2-389 of the Code of Virginia.

10. The trial court erred by denying defendant's request to be hard *ex parte* on his motion for scientific testing pursuant to § 2.1-434.11 of the Code of Virginia.

11. The trial court erred by denying the defendant's request to be heard *ex parte* on his motion for expert assistance in the fields of pathology and ballistics.

12. The trial court erred by denying the defendant's pretrial request for expert assistance in the fields of pathology and ballistics.

13. The trial court erred by denying the defendant's renewed request for a *Bill of Particulars* pursuant to Virginia Code Section 19.2-399.

14. The trial court erred by denying the defendant's request for individual *voir dire* of jurors.

15. The trial court erred by denying the defendant's *Motion to Declare the Virginia Capital Murder and Death Penalty Statutes Unconstitutional and to Prohibit the Imposition of the Death Penalty on the Grounds that the Virginia Death Penalty Statutes Violate the Virginia and United States Constitutions*, which *Motion* cited and relied upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 8, 9 and 11 of the Constitution of Virginia.

16. The trial court erred by denying the defendant's *Motion to Compel Discovery*.

17. The trial court erred by denying the defendant's *Motion for Continuance* heard on October 14, 1994.

18. The trial court erred by denying the defendant's motion to suppress evidence obtained from him in violation of the Fourth Amendment to the Constitution of the United States.

19. The trial court erred by denying the defendant's motion to suppress evidence obtained from him in violation of the Fifth Amendment to the Constitution of the United States.

20. The trial court erred by denying the defendant's motion *in limine* to prohibit the introduction of evidence concerning unadjudicated acts of the defendant related to an alleged murder in North Carolina.

21. The trial court erred by denying the defendant's proposed *voir dire* questions (numbered 1 through 12) concerning bias of potential jurors against the defendant and in favor of imposing the death penalty.

22. The trial court erred by denying the defendant's proposed *voir dire* questions (numbered 15 through 26) which attempted to determine racial bias of potential jurors.

23. The trial court erred by denying the defendant's proposed *voir dire* question (numbered 44A) concerning potential jurors' belief(s) as to whether a life sentence would be carried out.

24. The trial court erred by denying the defendant's proposed *voir dire* question (numbered 45) concerning potential jurors' belief(s) as to whether a sentence of death would be carried out.

25. The trial court erred by denying the defendant's challenge for cause to juror Pama.

26. The trial court erred in admitting Commonwealth's exhibit 23A.

27. The trial court erred by admitting the hearsay statement of a co-defendant that the defendant shot the victim.

28. The trial court erred by admitting into evidence witness J. K. Roland's testimony that the defendant was not telling the truth and was lying when the defendant denied shooting the victim.

29. The court erred by admitting into evidence witness J. K. Roland's testimony that the defendant knew the victim could not see his hands.

30. The trial court erred by admitting testimony of Christopher Daniels that he had been threatened by "admirers" of the defendant.

31. The trial court erred by denying the defendant's motion for a mistrial based on the Commonwealth's mention of parole eligibility in the presence of the jury.

32. The trial court erred in admitting the testimony of Thomas Trochum concerning the characteristics of a bullet from an unrelated case in North Carolina.

33. The trial court erred in denying the defendant's motion to strike the Commonwealth's evidence on the offense of capital murder made on the grounds that the evidence was insufficient to prove the element of premeditation.

34. The trial court erred in denying the defendant's renewed motion for the appointment of a forensic pathologist and a ballistics expert to assist the defense, and to continue the matter to provide sufficient time for the defendant to effectively consult with and otherwise made use of such experts.

35. The trial court erred in refusing to give defendant's proposed instruction "F" to the jury or to otherwise fully and properly instruct the jury concerning the meaning of "willful, deliberate, and premeditated" in light of the nature of the offense charged, the

evidence adduced at trial, and the law applicable thereto.

36. The trial court erred in denying defendant's renewed objection to admission of victim impact testimony at trial.

37. The trial court erred in permitting the admission at trial of evidence of the criminal records of individuals who allegedly conspired with the defendant to distribute marijuana.

38. The trial court erred in permitting the Commonwealth during cross-examination to question the defendant regarding the purported possession of a gun by the co-defendant, which gun was not connected in any way to the offense charged in this matter.

39. The trial court erred in permitting the Commonwealth to question the defendant regarding how many times he had talked with his attorneys about his testimony.

40. The trial court erred in refusing to give the jury defendant's proposed instruction "A1" or to otherwise fully and properly instruct the jury regarding the proper meaning of "aggravated battery" in light of the nature of the offense charged, the evidence adduced at trial and the law applicable thereto.

41. The trial court erred in refusing to give the jury defendant's proposed instruction "C1" or to otherwise fully and properly instruct the jury regarding their option to give effect to mitigating evidence by sentencing the defendant to life in prison even if they found one or all of the statutory "aggravating factors" beyond a reasonable doubt, in light of the nature of the offense charged, the evidence adduced at trial and the law applicable thereto.

42. The trial court erred in giving the jury finding forms which did not expressly provide a choice for a sentence of life imprisonment upon a finding of one or more aggravating factors.

43. The trial court erred in refusing, in response to a specific jury question regarding the possibility of parole, to instruct the jury that they were to presume their sentence would be carried out.

44. The trial court erred in refusing, in response to a specific jury request for clarification, to specifically instruct the jury that if they found one or more aggravating factors beyond a reasonable doubt, they could sentence the defendant to life in prison or to death.

45. The court erred in making the Victim Impact Statement a part of the record and considering it prior to sentencing the defendant.

46. The trial court erred in refusing to set aside the sentence of death after the consideration of the presentence report and the good cause shown for setting aside the sentence of death at the sentencing hearing.

47. The trial court erred in denying the defendant's motion to set aside the sentence of death.

QUESTIONS PRESENTED

1. WAS THE SENTENCE OF DEATH IN THIS CASE IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE, OR OTHER ARBITRARY FACTOR?

2. IS THE SENTENCE OF DEATH IN THIS CASE EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES?

3. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY REFUSING TO ORDER ALL THE ITEMS REQUESTED IN DEFENDANT'S *MOTION FOR BILL OF PARTICULARS*?

4. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY REFUSING TO ORDER ALL THE ITEMS REQUESTED IN THE DEFENDANT'S *MOTION FOR DISCOVERY AND INSPECTION*?

5. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S *MOTION TO ENJOIN LAW ENFORCEMENT OFFICERS FROM WEARING UNIFORMS IN COURTROOM WHILE SITTING AS SPECTATORS, OR GRANT OTHER APPROPRIATE RELIEF*?

6. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S *MOTION TO DISQUALIFY COMMONWEALTH'S ATTORNEY*?

7. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S REQUEST FOR THE ASSISTANCE OF AN EXPERT INVESTIGATOR.

8. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING TO HEAR *EX PARTE* HIS *EX PARTE MOTION FOR DISCLOSURE OF RECORDS MAINTAINED BY THE CENTRAL CRIMINAL RECORDS EXCHANGE*?

9. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANTS RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN DENYING THE DEFENDANT'S *EX PARTE MOTION FOR DISCLOSURE OF RECORDS MAINTAINED BY THE CENTRAL CRIMINAL RECORDS EXCHANGE*?

10. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING DEFENDANTS REQUEST TO BE HEARD *EX PARTE* ON HIS MOTION FOR SCIENTIFIC TESTING PURSUANT TO § 2.1-434.11 OF THE CODE OF VIRGINIA?

11 DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANTS REQUEST TO BE HEARD *EX PARTE* ON HIS MOTION FOR EXPERT ASSISTANCE IN THE FIELDS OF PATHOLOGY AND BALLISTICS?

12. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S PRETRIAL REQUEST FOR

EXPERT ASSISTANCE IN THE FIELDS OF PATHOLOGY AND BALLISTICS?

13. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING DEFENDANT'S RENEWED REQUEST FOR A BILL OF PARTICULARS PURSUANT TO VIRGINIA CODE § 19.2-399?

14. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S REQUEST FOR INDIVIDUAL *VOIR DIRE* OF JURORS?

15. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING DEFENDANT'S *MOTION TO DECLARE THE VIRGINIA CAPITAL MURDER AND DEATH PENALTY STATUTES UNCONSTITUTIONAL AND TO PROHIBIT THE IMPOSITION OF THE DEATH PENALTY ON THE GROUNDS THAT THE VIRGINIA DEATH PENALTY STATUTES VIOLATE THE VIRGINIA AND UNITED STATES CONSTITUTIONS?*

16. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S *MOTION TO COMPEL DISCOVERY*?

17. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S *MOTION FOR CONTINUANCE* MADE ON OCTOBER 14, 1993?

18. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM HIM IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

19. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM HIM IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

20. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S MOTION *IN LIMINE* TO PROHIBIT THE INTRODUCTION OF EVIDENCE CONCERNING UNADJUDICATED ACTS OF THE DEFENDANT RELATED TO AN ALLEGED MURDER IN NORTH CAROLINA?

21. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE

DEFENDANT'S PROPOSED *VOIR DIRE* QUESTIONS (NUMBERED 1 THROUGH 12) CONCERNING BIAS OF POTENTIAL JURORS AGAINST THE DEFENDANT AND IN FAVOR OF OPPOSING THE DEATH PENALTY?

22. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S PROPOSED *VOIR DIRE* QUESTIONS (NUMBERED 15 THROUGH 26) WHICH ATTEMPTED TO DETERMINE THE RACIAL BIAS OF JURORS?

23. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S PROPOSED *VOIR DIRE* QUESTION (NUMBERED 44A) CONCERNING POTENTIAL JURORS' BELIEFS AS TO WHETHER A LIFE SENTENCE WOULD BE CARRIED OUT?

24. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S PROPOSED *VOIR DIRE* QUESTION (NUMBERED 45) CONCERNING POTENTIAL JURORS' BELIEF(S) AS TO WHETHER A SENTENCE OF DEATH WOULD BE CARRIED OUT?

25. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S CHALLENGE FOR CAUSE TO JUROR PAMA?

26. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY ADMITTING COMMONWEALTH'S EXHIBIT 23A INTO EVIDENCE?

27. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA WHEN IT ADMITTED INTO EVIDENCE THE HEARSAY STATEMENT OF THE CODEFENDANT THAT THE DEFENDANT SHOT THE VICTIM?

28. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA WHEN IT ADMITTED INTO EVIDENCE WITNESS ROLAND'S TESTIMONY THAT THE DEFENDANTS [sic] WAS LYING WHEN HE DENIED SHOOTING THE TROOPER?

29. DID THE TRIAL COURT ERR AND VIOLATE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY ADMITTING INTO EVIDENCE WITNESS J. K. RONALD'S TESTIMONY THAT THE DEFENDANT KNEW THE VICTIM COULD NOT SEE HIS HANDS?

30. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY ADMITTING THE TESTIMONY OF CHRISTOPHER DANIELS THAT HE HAD BEEN THREATENED BY "ADMIRERS" OF THE DEFENDANT?

31. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL BASED ON THE COMMONWEALTH'S MENTION OF PAROLE ELIGIBILITY IN THE PRESENCE OF THE JURY?

32. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY ADMITTING THE TESTIMONY OF THOMAS TROCHUM CONCERNING THE CHARACTERISTICS OF A BULLET FROM AN UNRELATED CASE IN NORTH CAROLINA?

33. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN DENYING THE DEFENDANT'S MOTION TO STRIKE THE COMMONWEALTH'S EVIDENCE ON THE OFFENSE OF CAPITAL MURDER ON THE GROUNDS THAT THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENT OF PREMEDITATION?

34. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN DENYING THE DEFENDANT'S RENEWED MOTION FOR THE APPOINTMENT OF A FORENSIC PATHOLOGIST AND A BALLISTICS EXPERT TO ASSIST THE DEFENSE, AND TO CONTINUE THE MATTER TO PROVIDE SUFFICIENT TIME FOR THE DEFENDANT TO EFFECTIVELY CONSULT WITH AND OTHERWISE MAKE USE OF SUCH EXPERTS?

35. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING TO GIVE DEFENDANT'S PROPOSED INSTRUCTION "F" TO THE JURY OR TO OTHERWISE FULLY AND PROPERLY INSTRUCT THE JURY CONCERNING THE MEANING OF "WILLFUL, DELIBERATE, AND PREMEDITATED" IN LIGHT OF THE NATURE OF THE OFFENSE CHARGED, THE EVIDENCE ADDUCED AT TRIAL, AND THE LAW APPLICABLE THERETO?

36. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN DENYING THE DEFENDANT'S RENEWED MOTION OBJECTING TO THE INTRODUCTION OF VICTIM IMPACT EVIDENCE AT THE SENTENCING PHASE OF THE TRIAL?

37. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN PERMITTING THE ADMISSION AT TRIAL OF EVIDENCE OF THE CRIMINAL RECORDS OF INDIVIDUALS WHO ALLEGEDLY CONSPIRED WITH THE DEFENDANT TO DISTRIBUTE MARIJUANA?

38. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN PERMITTING THE COMMONWEALTH DURING CROSS-EXAMINATION OF THE DEFENDANT TO QUESTION HIM REGARDING THE PURPORTED POSSESSION OF A GUN BY THE CODEFENDANT, WHICH GUN

WAS NOT CONNECTED IN ANY WAY TO THE OFFENSE CHARGED IN THIS MATTER?

39. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN PERMITTING THE COMMONWEALTH TO QUESTION THE DEFENDANT REGARDING HOW MANY TIMES HE HAD TALKED WITH HIS ATTORNEYS ABOUT HIS TESTIMONY?

40. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING TO GIVE THE JURY DEFENDANT'S PROPOSED INSTRUCTION "A1" OR TO OTHERWISE FULLY AND PROPERLY INSTRUCT THE JURY REGARDING THE PROPER MEANING OF "AGGRAVATED BATTERY" IN LIGHT OF THE NATURE OF THE OFFENSE CHARGED, THE EVIDENCE ADDUCED AT TRIAL AND THE LAW APPLICABLE THERETO?

41. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING TO GIVE THE JURY DEFENDANT'S PROPOSED INSTRUCTION "C1" OR TO OTHERWISE FULLY AND PROPERLY INSTRUCT THE JURY REGARDING THEIR OPTION TO GIVE EFFECT TO MITIGATING EVIDENCE BY SENTENCING THE DEFENDANT TO LIFE IN PRISON EVEN IF THEY FOUND ON[E] OR ALL OF THE STATUTORY "AGGRAVATING FACTORS" BEYOND A REASONABLE DOUBT, IN LIGHT OF THE NATURE OF THE OFFENSE CHARGED, THE EVIDENCE

ADDUCED AT TRIAL AND THE LAW APPLICABLE THERETO?

42. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN GIVING THE JURY FINDING FORMS WHICH DID NOT EXPRESSLY PROVIDE A CHOICE FOR A SENTENCE OF LIFE IMPRISONMENT UPON A FINDING OF ONE OR MORE AGGRAVATING FACTORS?

43. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING, IN RESPONSE TO A SPECIFIC JURY QUESTION REGARDING THE POSSIBILITY OF PAROLE, TO INSTRUCT THE JURY THAT THEY WERE TO PRESUME THEIR VERDICT WOULD BE CARRIED OUT?

44. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING, IN RESPONSE TO A SPECIFIC JURY REQUEST FOR CLARIFICATION, TO SPECIFICALLY INSTRUCT THE JURY THAT IF THEY FOUND ONE OR MORE OF THE AGGRAVATING FACTORS BEYOND A REASONABLE DOUBT, THEY COULD SENTENCE THE DEFENDANT TO LIFE IN PRISON OR TO DEATH?

45. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN MAKING THE VICTIM IMPACT STATEMENT A PART OF THE

RECORD AND CONSIDERING IT PRIOR TO SENTENCING THE DEFENDANT?

46. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING TO SET ASIDE THE SENTENCE OF DEATH AFTER CONSIDERATION OF THE PRE-SENTENCE REPORT AND THE GOOD CAUSE SHOWN FOR SETTING ASIDE THE SENTENCE OF DEATH AT THE SENTENCING HEARING?

47. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN DENYING DEFENDANT'S MOTION TO SET ASIDE THE SENTENCE OF DEATH?

NATURE OF THE CASE

This is a capital murder case which arises from the shooting death of a Virginia state trooper on February 2,4 1993, on the Potomac Mills exit ramp off I-95 in Prince William County. The defendant

* * *

VIRGINIA SUPREME COURT

[Caption Omitted In Printing]

* * *

899, 2570-2571.

Regarding assigned error 41, the defendant also proposed jury instruction "C1", worded as follows: "Even if you find that the Commonwealth has proved one or both of the aggravating factors beycnd a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison." *Appendix*, 901. The court denied the instruction. *Appendix*, 2578.

Regarding assigned error 43, during their deliberations on sentencing the jurors asked the following question to the court: "Does the sentence of life imprisonment in the State of Virginia have the possibility of parole, and if so under what conditions must be met to receive parole?" The Court instructed the jury, "You should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." The defendant objected to the instruction given by the court and requested that the jury be instructed that they should presume their sentence should be carried out. *Appendix*, 2713-2714.

Regarding assigned error 44, during their deliberations in the penalty phase of the trial, the jury sent out a written question asking the court to "clarify" whether or not they had a "duty" to impose the death penalty if they found one of the aggravating factors beyond a reasonable doubt, or whether they could choose between the death

penalty and a life sentence. *Appendix*, 896, 2717-2718. The court refused the defendant's request that the jury be instructed that they could impose a life sentence even if they found one or both of the aggravating factors beyond a reasonable doubt. *Appendix*, 2718-2719, instead instructing them to reread the second paragraph of the finding instruction. *Id.*

Regarding assigned error 45, over the defendant's objection, a Victim Impact Statement, consisting of a letter written by Mrs. Cavazos, was made a part of the record and considered by the court prior to sentencing the defendant. *Appendix*, 945W, 2734-2736.

Regarding assigned error 46, after considering the pre-sentence report and matters raised in the sentencing hearing on January 13, 1994, the trial court sentenced the defendant to death. *Appendix*, 2731-

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VIRGINIA SUPREME COURT

[Caption Omitted In Printing]

* * *

41st Assigned Error

In a capital murder case, consideration of the character and record of the individual offender is indispensable in meeting the requirements of the Eighth Amendment. *Woodson v. North Carolina, supra.* In *Penry v. Lynaugh* the Supreme Court stated that " . . . it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider *and give effect to* mitigation evidence relevant to a defendant's character or record or the circumstances of the offense." 492 U.S. 302, 327-328, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989) (emphasis added). The Court further stated, " . . . in the absence of instructions informing the jury that it could consider *and give effect to mitigating evidence . . . by declining to impose the death penalty*, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to the evidence in rendering its sentencing decision. *Id.*, (emphasis added), quoting *California v. Brown*, 479 U.S. 538, 545, 93 L.Ed.2d 934, 101 S.Ct. 837 (1987) (O'Connor, J., concurring).

Instruction C1 was a correct statement of the law under *Penry*, was not needlessly redundant, and was materially vital to the defendant; it should therefore have been given to the jury by the court. *See Jimenez* and *Wade, supra.*

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

42nd Assigned Error

The statutory finding forms in Virginia do not expressly provide for a finding of one or both of the aggravating factors beyond a reasonable doubt and a sentence of life imprisonment; they are therefore violative of the principle enunciated in in [sic] *Penry, supra.*

The court's error in failing to provide the jury with finding forms complying with *Penry* violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

43rd Assigned Error

It was obvious from the question presented by the jury that the jurors were considering extraneous matters which had not been raised either by the evidence or by the instructions given them. The only reference to parole heard by the jury occurred when the Commonwealth asked witness Daniels when he was eligible for parole, *Appendix*, 2267, after Daniels testified he had been sentenced to forty years, *Appendix*, 2257. Although the court instructed the jurors to disregard the question, *Appendix*, 2269, obviously the jurors did not do so. The jury wished to know how long the defendant would spend in prison if

they awarded a sentence of life imprisonment and at least one or more of the jurors was considering an extraneous factor other than the law and evidence of the case. Various studies have shown that juror's beliefs concerning parole are often erroneous. *See The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing,* 75 Va. L. Rev. 1605 (1989). The instruction given is inadequate to remind the jurors of their duties; indeed, the admonition "You are not to concern yourself with what happens afterwards" raises by implication that something will happen afterwards to reduce a life sentence or reduce a death sentence. At a minimum, the jury should have been instructed that they should consider the two alternatives they had before them as being the punishment the defendant would receive. Defendant's proposed instruction that the jury should presume that their sentence would be carried out would have required the jury to consider the alternatives seriously without the extraneous factor of parole, which by the nature of the jury question had entered into their deliberations. A defendant should not be sentenced to death on the basis of information which he has no opportunity to deny or explain. *Skipper v. South Carolina,* 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986); *Gardner v. Florida,* 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977). The instruction proposed by the defendant in response to the jury's question is even less definitive than a similar instruction held to be constitutionally inadequate in a like situation. *See Simmons v. South Carolina,* 62 USLW 4509 (1994).

Denial of defendant's proposed instruction violated his rights under Article I, Sections 8 and 11 of the Constitution of Virginia and the Fifth, Sixth, Eighth and

Fourteenth Amendments to the Constitution of the United States.

44th Assigned Error

The defendant relies on the argument set forth under the *41st Assigned Error, supra,* in response to the question presented on this error.

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

45th Assigned Error

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

46th Assigned Error

The trial court's failure to set aside the sentence of death and impose a life sentence, where good cause was shown for setting aside the death sentence, violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

47th Assigned Error

The jury found that the defendant's conduct was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim and fixed his punishment at death. *Appendix,* 898. The only evidence to support the finding of the jury was that of the aggravated battery to the victim resulting in death. The victim died as a result of multiple gunshot wounds which may indeed constitute an aggravated battery within the meaning of Va. Code Section 19.2-

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Lonnie WEEKS, Jr.,

v.

COMMONWEALTH of Virginia.

Record No. 940335.

Supreme Court of Virginia.

Nov. 4, 1994.

William J. Baker, Daniel J. Morissette, Manassas (DePolo & Morissette, on brief), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen. (James S. Gilmore, III, Atty. Gen., on brief), for appellee.

Present: All the Justices.

COMPTON, Justice.

On February 24, 1993, Virginia State Trooper Jose M. Cavazos was shot and killed by defendant Lonnie Weeks, Jr., in Prince William County. Subsequently, defendant was indicted for the felonious, willful, deliberate, and premeditated homicide of the law enforcement officer, when such killing was for the purpose of interfering with the performance of the trooper's official duties. Code § 18.2-31(6). Defendant also was charged with grand larceny of a motor vehicle, Code § 18.2-95, and use of a firearm in the commission of murder, Code § 18.2-53.1.

Following several pretrial hearings, including a hearing on defendant's motion to suppress his confession, defendant was tried by a single jury during five days in October 1993. As the trial began, defendant pled guilty to

the grand larceny and firearm charges. The court subsequently sentenced defendant to imprisonment for ten-year and three-year terms respectively on those charges.

The jury found the defendant guilty of the capital murder charge and, during the second phase of the bifurcated capital proceeding, the jury fixed the defendant's punishment at death for the capital offense based upon the vileness predicate of the capital murder sentencing statute. Code § 19.2-264.4.

Later, the trial court considered a probation officer's report and heard testimony from the officer relevant to punishment. The court then sentenced the defendant to death for the capital murder.

The death sentence is before us for automatic review under Code § 17-110.1(A), *see* Rule 5:22. As required by statute, we will consider not only the trial errors enumerated by the defendant but also whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. Code § 17-110.1(C).

There is no conflict about any relevant fact in the case. In early February 1993, defendant, who was age 20, a North Carolina resident, and on probation for a 1992 drug conviction, participated in the burglary of a residence in the Fayetteville, North Carolina area. During the course of that crime, defendant obtained a set of keys to a 1987 Volkswagen Jetta automobile parked at the residence, and stole the vehicle. Later that month, defendant drove the vehicle to Washington, D.C., intending to sell it or trade it for drugs. Defendant carried in the vehicle a

Glock Model 17, nine millimeter, semi-automatic pistol loaded with hollow-point bullets. According to the testimony, the bullets were designed for police use, not target practice or hunting; this type of bullet is referred to as a "man-stopper."

During the late evening of February 23, defendant was riding as a passenger in the vehicle being driven by his uncle, 21-year-old Lewis J. Dukes, Jr., a resident of the District of Columbia. The pair was travelling en route from Washington to Richmond southbound on Interstate Route 95.

Around midnight, Trooper Cavazos was operating radar from his marked police vehicle parked in the highway medium monitoring southbound traffic. The Volkswagen driven by Dukes passed the trooper's position at a high rate of speed. The officer activated his vehicle's emergency lights and proceeded to chase the vehicle occupied by defendant. After travelling a brief distance, and passing other vehicles by driving on the right shoulder of the highway, Dukes brought the car to a stop on the Dale City exit ramp, in a dark, remote area.

The trooper pulled his patrol car to a stop behind the Volkswagen, which he approached on foot on the driver's side. Upon the officer's request, Dukes alighted and was standing toward the left rear of the Volkswagen when the trooper asked defendant to step out of the vehicle.

Defendant complied with the officer's request and alighted on the right side of the vehicle as the trooper was near the left side. As defendant left the vehicle he was carrying the fully loaded pistol. He then fired at least six bullets at the officer, two of which entered his body

beside the right and left shoulder straps of the protective vest the trooper was wearing. The officer was immediately rendered unconscious and fell to the pavement, dying within minutes at the scene with his police weapon in its "snapped" holster.

Defendant, with Dukes as a passenger, then drove the Volkswagen from the scene and parked it on the lot of a nearby service station. Defendant returned to the scene of the crime on foot and retrieved Dukes' District of Columbia driver's license that had been dropped on the pavement. Defendant rejoined Dukes, and they were found by police shortly thereafter in the parking lot of a nearby motel.

On appeal, defendant assigns 47 alleged errors committed by the trial court. The defendant has not briefed or argued ten of those assigned errors (Nos. 4, 5, 6, 7, 8, 17, 26, 31, 38, and 39); hence we will not consider them. *Jenkins v. Commonwealth*, 244 Va. 445, 451, 423 S.E.2d 360, 364 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993). In addition, defendant effectively presents no argument in support of five of those alleged errors (Nos. 16, 34, 44, 45, and 46). Typical of the argument in support of those five is the following conclusional statement on brief in support of No. 45: "This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia." We have considered these so-called arguments and find no merit in any of the five.

The remaining assignments of error emphasized by defendant present questions dealing with defendant's

detention before his arrest, his confession, requests for a scientific investigation and expert assistance in the fields of ballistics and pathology, the seating of one juror who was challenged for cause, and use during the trial's penalty phase of victim impact evidence.

First, defendant contends that he was detained for approximately two hours before he was arrested and that this constituted an illegal arrest without probable cause. Because the arrest was illegal, defendant argues, the trial court erred by admitting in evidence defendant's statements to police that were the product of the illegal arrest.

The facts relevant to this issue were presented both at a pretrial suppression hearing and during the trial. The evidence showed that Prince William County police officer James C. Virgil, Jr., was dispatched to the scene of the crime about 12:53 a.m. on February 24, and began searching the immediate area for possible suspects. Shortly, Virgil saw defendant and Dukes walking in the rear parking lot of the motel located about one-half mile from the scene. The men, who were walking close together toward Virgil's marked police car, "turned back around and started to walk away" from the car. Then the pair "started to split apart. One subject was going to the left and one going to the right." When the officer was 15-20 feet from them with the vehicle's headlights and spotlight operating, he stopped the vehicle and began to step from the car. At that point, the men "immediately" threw "both their hands up in the air" and one said "Don't shoot." Virgil then said, "Police. Don't move. Can I talk to you all?"

Virgil approached the men and said, "Is it okay if I pat you down for my safety?" Defendant said "go ahead." Virgil felt the outside of their clothing and seized nothing from either man. At the time Virgil noticed that defendant "was breathing heavily and was sweating profusely." Defendant was wearing a plaid shirt, blue jeans, and no jacket in 29-degree weather. The officer began asking "just basic casual talking questions." The men produced identification with defendant showing a North Carolina driver's license.

When the officer asked, "What are you all doing here?" defendant said they had been "dropped off" at the motel parking lot by a relative several hours earlier to await "two girls from Washington, D.C." While there, defendant said, "We heard the shots." Virgil asked, "What shots?" Without directly responding to that question, defendant stated that he ran "to where the shots came from" and saw a State Trooper on the ground who had been shot. Defendant said that he "ran over to the trooper and he rolled the trooper over to help him." Defendant stated that as other police officers arrived at the scene, he returned to the motel parking lot.

Virgil then asked defendant if the pair "would mind" remaining at the motel to await an investigator to interview them, inasmuch as they were the only persons who had heard the shots and defendant had been to the scene. Defendant agreed, stating "that's fine."

In a few minutes, Prince William County police officer Lyle Denny arrived to assist Virgil. Denny made "a pat down" of defendant and removed from defendant's left trouser pocket "a group of Volkswagen keys." After

examining the keys, Denny returned the keys to the pocket.

Because of the cold weather and the fact that defendant was not wearing a jacket or sweater, Virgil asked the pair whether they would like to sit in his police car. Defendant replied, "I thought you'd never ask. Sure." The two men entered the back seat of the vehicle. Even though the pair could not open the rear doors from the inside, they did not ask to get out. They were not restrained with handcuffs or similar devices. A plastic barrier separating the front and rear parts of the vehicle was in the "down" position, enabling them to speak easily with Virgil when he was in the front seat.

A short while later, upon defendant's request, he was taken to the motel and permitted to make two telephone calls. After making the calls, defendant asked "if he could go get some food and something to drink up at" the service station. About the same time, Virgil learned from the police radio that county officers had located "a suspicious vehicle" at the service station, about 75 yards from the motel lot. Virgil responded to Weeks' request with, "Do you mind holding off right now? . . . I can't let you do that right now, if that's okay with you." Defendant said, "Fine."

A few seconds later, Virgil learned from another radio transmission that the "suspicious" vehicle was a Volkswagen bearing North Carolina license plates. Recalling that defendant had Volkswagen keys in his pocket and carried a North Carolina operator's license, Denny asked defendant, who was inside the police vehicle, "where the keys that were in his pocket were." Defendant

responded, "What keys?" The officer asked defendant to step out of the vehicle and "patted" defendant's pants pockets, finding no keys. Then the rear seat of the vehicle was lifted, and the keys were found directly under where defendant had been sitting. When the officer showed the keys to defendant, he said, "Those aren't my keys."

About 2:45 a.m., after defendant had been with Officer Virgil for about two hours, state police officers arrived to question defendant and Dukes. Near 3:00 a.m., state police Special Agent J.K. Rowland met defendant in the motel lobby. Rowland "explained to him that he was not under arrest" and asked defendant "if he would like to talk . . . about what he had seen up on Interstate 95." Defendant, who Rowland testified was "free to leave at that time," conducted an interview with defendant in private in one of the motel rooms.

We do not agree with defendant's contention that his two-hour detention while being questioned by Officers Virgil and Denny violated his Fourth Amendment rights under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny. *Terry* is not implicated here because, as the trial court found from the undisputed facts, defendant consented to the detention and generally agreed to cooperate with the police. Just as a defendant may consent to a search, he may also consent to what would otherwise amount to a seizure of his person. *Limonja v. Commonwealth*, 8 Va.App. 532, 539-41, 383 S.E.2d 476, 480-82 (1989), *cert. denied*, 495 U.S. 905, 110 S.Ct. 1925, 109 L.Ed.2d 288 (1990).

At every step in the questioning during the whole two-hour period, the defendant readily agreed to the

detention. He consented to the initial "pat down," acquiesced to questioning, accepted the invitation to enter the police car, agreed not to go to the service station for food and drink, acquiesced to a second and third "pat down" of his trouser pockets, and agreed to be interviewed alone in the motel room by Rowland. "The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." *Florida v. Bostick*, 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 L.Ed.2d 389 (1991).

Next, defendant contends that the trial court erred in denying his motion to suppress the confession made to Special Agent Rowland because the authorities failed to scrupulously honor his request to remain silent.

The facts relevant to this issue show that as Rowland questioned defendant in the motel room, Rowland became "more and more suspicious" of defendant. Even though defendant "was free to leave" at that point, Rowland advised defendant of his constitutional rights according to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as a precaution at 7:40 a.m. Defendant then exercised his right to remain silent and wrote, "Do not want to discuss case any further," on the "Advice of Rights" form that he signed. Rowland honored this request, and ceased questioning.

At 7:50 a.m., Rowland was advised by another investigator that Dukes had just stated that defendant shot the trooper. Rowland arrested defendant at 7:52 a.m.

Subsequently, defendant was taken before a magistrate and then to the Adult Detention Center in Manassas.

Later that morning, classification officers in the jail routinely questioned defendant about his physical and mental state; no attempt was made to elicit information about the crime. During the interview, defendant indicated he was considering suicide because he had shot the trooper. Defendant also voluntarily wrote a letter to a jail official admitting the killing and expressing remorse. Defendant does not contest either of these admissions but attacks the constitutional validity of the following interview.

Near 6:00 p.m. on February 24, defendant was brought to the lounge of the local prosecutor's office where Rowland again interviewed him; additional information had been developed by the police during the day between the termination of the first interview and the beginning of this second interview. Rowland asked defendant, "Do you remember the rights I read to you earlier today?" to which defendant responded affirmatively. Rowland proceeded "to summarize the investigation through the course of the day's events to that point in time."

Among other things, Rowland told defendant that an eyewitness to the shooting had made a positive identification of him as the assailant. A witness actually had identified defendant as a person she saw at the scene after the homicide, but she had not witnessed the shooting. At the conclusion of Rowland's summary, he said to defendant, "This is your opportunity to provide your explanation as to what happened at the shooting scene." Defendant responded, "Yes, I was packing." The officer knew that "packing" meant "carrying a firearm."

The defendant then confessed to the trooper's murder. Defendant stated that when the trooper asked him to get out of the Volkswagen, he picked up the pistol and "thought about throwing it away." Instead, he saw the trooper put his hand down toward his service revolver. Defendant said he then "panicked" and shot the victim "several times rapidly." Defendant stated that he drove, with Dukes as a passenger, to the service station, placing the pistol under the front floor mat of the Volkswagen. This interview lasted about one hour during which defendant readily answered questions and did not invoke his right to remain silent or any other constitutional right.

In support of his attack on the validity of the confession, defendant notes that he made no request to speak with the police after he exercised his right to silence at 7:40 a.m. Instead, he points out, he was held in jail and transported to the prosecutor's office about ten hours later. He notes that at the time of the interview he was restrained in handcuffs and leg irons, being questioned by the same officer to whom he previously indicated a desire to remain silent. Defendant also points out that he was not "read his rights" again, merely "asked if he understood the rights read to him previously." Thus, defendant contends, the confession later introduced at trial violated his constitutional rights. We do not agree.

In *Miranda*, the Supreme Court stated that, once the required warnings have been given a person before a custodial interrogation, the interrogation must cease if the individual, "at any time prior to or during questioning," expresses a desire to remain silent. 384 U.S. at 474,

86 S.Ct. at 1627. At this point, the Court said, the individual has shown an intention "to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Id.*

Subsequently, in discussing the scope of the foregoing *Miranda* passage, the Supreme Court said: "Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." *Michigan v. Mosley*, 423 U.S. 96, 102-03, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). The Court held "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' " *Id.* at 104, 96 S.Ct. at 326. *Accord Lamb v. Commonwealth*, 217 Va. 307, 312, 227 S.E.2d 737, 741 (1976).

We will assume Rowland's preliminary comments at the second interview giving defendant the "opportunity" to explain his part in the crime amounted to an "interrogation." The question thus becomes whether defendant's prior election to remain silent was "scrupulously honored." We hold that it was.

Suggesting a case-by-case approach to determine that continued questioning was appropriate after an initial refusal to answer questions, the *Mosley* court mentioned five factors that related to the evidence in that case. First, whether defendant "was carefully advised" before the

initial interrogation "that he was under no obligation to answer any questions and could remain silent if he wished." *Id.* at 104, 96 S.Ct. at 327. Second, whether there was an immediate cessation of the initial interrogation, and no attempt to persuade defendant to reconsider his position. *Id.* Third, whether the police resumed questioning "only after the passage of a significant period of time." *Id.* at 106, 96 S.Ct. at 327. Fourth, whether *Miranda* warnings preceded the second questioning. *Id.* at 104, 96 S.Ct. at 326-27. Fifth, whether the second interrogation was limited to a crime that had not been the subject of the earlier interrogation. *Id.*

Clearly, when those factors are applied to the present case, no violation of defendant's Fifth Amendment rights occurred. Defendant was carefully advised before the initial interview of his right to remain silent, and there was immediate cessation of that interview when defendant exercised his right to silence. Moreover, ten hours, "a significant period of time," had passed between the first and second interviews, during which time defendant had confessed to the classification officers.

Furthermore, even though a fresh set of *Miranda* warnings was not given before the second interview as was the case in *Mosley*, defendant responded affirmatively when asked whether he remembered the "rights" that were read to him "earlier today." He then readily and without hesitation freely discussed the matter with the investigator and did not revoke his valid waiver. Under these circumstances, the initial waiver is presumed to continue and the failure to offer defendant a new set of warnings does not render the second interview unconstitutional. *See North Carolina v. Butler*, 441 U.S. 369, 373,

99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979); *Washington v. Commonwealth*, 228 Va. 535, 548, 323 S.E.2d 577, 586 (1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

Finally, the mere fact that the second interview involved some of the same subject matter discussed during the initial interview does not render the confession constitutionally invalid. *United States v. House*, 939 F.2d 659, 662 (8th Cir.1991). Defendant was advised of the new facts that had been developed by the investigators, and there was no effort to persuade defendant against his will after he initially invoked his right to silence by repeating questions about the same subject matter covered earlier. Hence, there was no violation of *Miranda* under that prong of *Mosley* as a result of the reinterrogation. *See Jackson v. Wyrick*, 730 F.2d 1177, 1180 (8th Cir.), *cert. denied*, 469 U.S. 849, 105 S.Ct. 167, 83 L.Ed.2d 102 (1984).

Next, the defendant complains about the denial of two pretrial motions, which defendant wished to be considered by the court ex parte out of the prosecutor's presence.

First, defendant filed a paper entitled "Ex Parte Motion for Disclosure of Records Maintained by the Central Criminal Records Exchange." In the motion, defendant sought copies of any criminal records pertaining to a number of individuals, including himself and Dukes, and certain North Carolina residents likely to be called as witnesses by the prosecutor. Over defendant's objection, the trial court permitted the prosecutor to attend the hearing on the motion and to argue against granting it. Following the hearing, the court denied the motion.

Code § 19.2-389 is codified among the statutes dealing with the duties and authority of the Exchange (CCRE), a separate division within the Department of State Police and, with a few exceptions, "the sole criminal record-keeping agency of the Commonwealth." Code § 19.2-387(A). Section 19.2-389 provides, in part, that upon "an ex parte motion of a defendant in a felony case and upon the showing that the records requested may be relevant to such case, the court shall enter an order" requiring the CCRE to furnish the defendant copies of any records of persons designated in the order on whom a report has been made to the CCRE. The statute is silent about the nature of any hearing on such motion.

We will assume, but not decide, that the statute is applicable to discovery in felony cases, that the defendant is entitled to be heard ex parte, and that the trial court erred in denying his motion under the statute. Nevertheless, we hold that the court did not commit reversible error because nothing in the record suggests that the trial court's rulings prejudiced defendant's right to fairly defend himself. *See George v. Commonwealth*, 242 Va. 264, 281, 411 S.E.2d 12, 23 (1991), *cert. denied*, 503 U.S. ___, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992).

Many of the persons named in the motion, including Dukes, did not testify at trial. In addition, the trial court had already ordered the prosecutor to furnish defendant before trial criminal history information concerning any witness to be called by the prosecutor "at any hearing in or trial of this case." Therefore, the "ex parte motion" was redundant.

Second, defendant filed a paper labelled "Motion For Scientific Investigation, Ex Parte." Relying upon Code § 2.1-434.11, defendant moved the court to order a scientific investigation into certain factors surrounding the victim's death, including whether death was instantaneous as a result of the fatal wounds.

Code § 2.1-434.11 is codified among the statutes establishing a Division of Forensic Science within the State Department of General Services. That statute authorizes an attorney for an accused to request a scientific investigation, if the attorney believes in good faith that such investigation may be relevant to the criminal charge. The statute provides that the "motion shall be heard ex parte" and, if satisfied as to the correctness of the attorney's representation, the court shall order the investigation to be performed by the Division.

We do not reach the merits of the defendant's complaint because the issue has been procedurally defaulted. The trial court never denied the motion. At the hearing on the motion, with the prosecutor present, the trial court said that it would entertain the motion later upon defendant's showing that he had unsuccessfully sought the results of such testing that probably already had been conducted by the Division. Defense counsel did not object to this ruling; instead, he withdrew the motion as being not "timely." Because defendant acquiesced in the trial court's ruling, he may not challenge it on appeal. Rule 5:25.

Associated with defendant's claim of error relating to the request for a scientific investigation is the complaint that the trial court erred by denying his request to be

heard ex parte on his motion for expert assistance in the fields of pathology and ballistics, and for denial of the request for appointment of such experts. Defendant asked that his motion for funding for expert assistance "be treated under the same procedure as required by Title 18 USC 3006A(e) in Federal Court." There is no merit to this contention.

We already have decided that a defendant charged with capital murder is not entitled to an ex parte hearing on his motion for expert assistance. *Ramdass v. Commonwealth*, 246 Va. 413, 422, 437 S.E.2d 566, 571 (1993), *rev'd on other grounds sub nom. Ramdass v. Virginia*, ___ U.S. ___, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). In addition, we specifically have refused to apply the federal statute to state capital murder prosecutions. *Id.*

Before moving to the last two issues emphasized by defendant, we will comment on other matters raised before trial that are the subject of assignments of error. These issues warrant only a brief discussion because none of them has merit. Defendant raises related arguments regarding the trial court's partial denial of motions for bills of particulars. No challenge was made to the sufficiency of the indictment; thus, a bill of particulars was not required. *Strickler v. Commonwealth*, 241 Va. 482, 490, 404 S.E.2d 227, 232-33, *cert. denied*, 503 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991). Defendant has procedurally defaulted a contention that we repeatedly have rejected, that is, that Virginia's capital murder and death penalty statutes are constitutionally infirm. In support of that contention, defendant impermissibly incorporates by reference a memorandum filed on the subject in the trial court. *Jenkins*, 244 Va. at 461, 423 S.E.2d at 370 (defendant

has obligation to state clearly to appellate court grounds for assertion trial court's ruling erroneous; cross-reference to arguments presented at trial insufficient).

Next, defendant raises several issues dealing with juror voir dire. He contends the trial court erred in denying individual voir dire and in refusing to allow a number of questions that he submitted to be asked of the prospective jurors. A defendant has no right to individual voir dire. *Stewart v. Commonwealth*, 245 Va. 222, 229, 427 S.E.2d 394, 399, *cert. denied*, ___ U.S. ___, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993). Also, the trial court did not abuse its discretion in disallowing the questions because they were either improper, vague, argumentative, or nonspecific. *Buchanan v. Commonwealth*, 238 Va. 389, 402, 384 S.E.2d 757, 765 (1989), *cert. denied*, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990). And, contrary to defendant's argument, the trial court did not abuse its discretion, in this case of a white victim and a black accused, in the manner which it questioned the prospective jurors on the subject of potential racial bias. *See Turner v. Murray*, 476 U.S. 28, 37, 106 S.Ct. 1683, 1688-89, 90 L.Ed.2d 27 (1986) (trial judge retains discretion as to form and number of questions on issue of racial bias when capital murder defendant accused of interracial crime).

Also, defendant argues the trial court erred in denying his challenge for cause of juror Frederick Pama. Responding to the question whether he knew personally anyone who was the victim of a violent crime, Pama said, "About three years ago . . . my wife's first cousin, who was very close to us, got killed. He was a police officer, from a drug shootout, and that affects me."

Pama initially had answered many questions by the trial court and counsel which reflected his ability to serve as an impartial juror. After he answered the foregoing question, he responded to questions by the prosecutor and said he could set aside any opinion he had formed about the case and could render a decision based solely on the law, and evidence produced at trial. Finally, when asked again by the prosecutor whether he "could be fair and impartial and set aside anything" he may have heard in the past and whether he could "be fair in this matter, both to the Commonwealth and to the accused," Pama answered, "I think so."

When denying defendant's motion to strike Pama, the trial court stated that "the proposed juror did not say that it would have an impact. He said, the way I understood his answer, he was not certain if it would have an impact, but at this time it would not."

Upon appellate review, we must give deference to the trial court's decision whether to exclude or retain a prospective juror because the trial court "sees and hears the juror;" accordingly, the trial court's decision will be disturbed only upon a showing of manifest error. *Eaton v. Commonwealth*, 240 Va. 236, 246, 397 S.E.2d 385, 391 (1990), *cert. denied*, 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991) (quoting *Wainwright v. Witt*, 469 U.S. 412, 426, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985)). *Accord George*, 242 Va. at 276, 411 S.E.2d at 19 (juror not automatically disqualified on account of fact son had served as pallbearer at victim's funeral).

We find no manifest error in the court's refusal to dismiss Pama for cause. From a review of Pama's entire

voir dire, we conclude that the trial court was justified in finding that Pama could be impartial during the trial. Our duty to defer to the trial judge on this subject is illustrated by Pama's final answer, "I think so," which the trial judge, not this Court, heard. The juror's emphasis on "so" in that answer conveys an entirely different meaning than if the emphasis had been on "think." On appeal, we must presume he emphasized "so."

Finally, defendant contends the trial court erred in admitting "victim impact testimony" during the penalty phase of the trial. The victim's widow, as well as state troopers who worked with the deceased, testified about the profound effect the killing had on his surviving family and those with whom he worked.

On appeal, defendant mounts a two-prong argument: so-called "victim impact evidence" is not relevant in Virginia to the jury's sentencing decision in a capital case, and, even if it is, the evidence should be limited to the effect upon family members only and not to the effect upon nonfamily members closely associated with the victim. We will not address the latter contention because, in the trial court, the defendant did not distinguish between testimony by family members and testimony from other sources. Therefore, the defendant may not challenge on appeal the admissibility of the troopers' testimony. Rule 5:25.

Addressing the former contention, we hold that victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia, and that the trial court did not err in admitting the testimony in this case. In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115

L.Ed.2d 720 (1991), the Supreme Court authorized the use of such testimony. The Court said: "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.* at 827, 111 S.Ct. at 2609.

Defendant's reliance on *Dingus v. Commonwealth*, 153 Va. 846, 149 S.E. 414 (1929), is misplaced. There, in a unitary criminal trial, this Court held improper a prosecutor's argument alluding to the impact of the murder on the victim's widow, because it "in no way assists in determining either the guilt or the innocence of the accused." 153 Va. at 850, 149 S.E. at 415. In contrast, under Virginia's modern, bifurcated capital procedure, victim impact evidence is probative, for example, of the depravity of mind component of the vileness predicate, which the jury in this case found as a basis for imposing the death penalty. As the Supreme Court said in *Payne*, "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." 501 U.S. at 825, 111 S.Ct. at 2608.

In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of those issues and conclude that none has any merit. Only two of those issues warrant further discussion. First, defendant claims the trial court erred in permitting Special Agent Rowland to testify that Dukes had stated to another investigator

"that Lonnie Weeks did, in fact, shoot the trooper." At trial, defendant objected to the statement specifically on the ground that it was inadmissible hearsay and generally on constitutional grounds.

The hearsay rule does not operate to exclude evidence of a statement offered for the mere purpose of explaining the conduct of the person to whom it was made; this is especially true when the evidence is not offered for the purpose of establishing guilt or innocence of the accused "but for the purpose of showing the reason for the police officers' action in arresting him." *Upchurch v. Commonwealth*, 220 Va. 408, 410, 258 S.E.2d 506, 508 (1979). *See Manetta v. Commonwealth*, 231 Va. 123, 127-28, 340 S.E.2d 828, 830 (1986). As the prosecutor argued, and the trial court implicitly found, this statement was offered to explain Rowland's action in arresting defendant at 7:52 a.m. after considering defendant not in custody 12 minutes earlier, and not to prove that defendant had in fact shot the trooper. Thus, the trial court did not err in admitting the statement.

Second, defendant contends the trial court erred in denying his motion to strike the Commonwealth's evidence on the offense of capital murder made on the ground that the evidence was insufficient to prove the element of premeditation. The question whether a defendant is guilty of a premeditated killing of the victim is usually a jury question. The intention to kill need not exist for any specified length of time prior to the actual killing; the design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill. *Clozza v. Commonwealth*, 228 Va. 124, 134, 321 S.E.2d 273, 279 (1984),

cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). In deciding the question, the jury may consider, among other things, the brutality of the attack and whether more than one shot was fired. *Id.*

In the present case, the jury's finding on this element was fully supported by the evidence, and the trial court did not err in denying the motion to strike. On probation, riding in a stolen vehicle, and possessing a weapon that the evidence showed had been used in a previous North Carolina murder, defendant shot the trooper at virtually point-blank range at least six times to avoid arrest. Several of the bullet wounds, according to the evidence, probably were the result of ricochet, indicating that the trooper may have been fired upon while lying on the pavement. These and other factors surrounding the killing amply proved premeditation.

Lastly, defendant contends that the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor, and is excessive or disproportionate to the penalty imposed in similar cases. We do not agree.

As we have said, the jury fixed defendant's sentence at death on the capital murder conviction upon the "vileness" predicate. Defendant points to no meaningful basis for concluding that the determination was made arbitrarily. He merely says the "verdict is irreparably tainted by the error-filled process that produced it" and he is "not a person who deserves to die." On the contrary, the record amply supports the conclusion that the sentence was appropriate under the circumstances.

On the question of "vileness," the jury found that defendant's conduct in committing the offense involved "depravity of mind and/or aggravated battery." Both of these components of the vileness predicate were established. For example, defendant, in an attempt to avoid arrest, shot the trooper at least six times from close range with a high-powered revolver, two of the shots being independently fatal, under the evidence. The officer posed no threat to defendant in connection with this routine traffic stop; the trooper died with his service revolver still enclosed in its holster. Then, the defendant left and returned to the scene, falsely claiming that he attempted to render assistance to the victim when his real purpose was to retrieve incriminating evidence.

On the question of excessiveness and disproportionality, we determine whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant. Code § 17-110.1(C)(2); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). To assist in this determination, we consider records of all capital murder cases reviewed by this Court, including cases where life imprisonment has been imposed. Code § 17-110.1(E).

In *Smith v. Commonwealth*, 239 Va. 243, 271, 389 S.E.2d 871, 886, *cert. denied*, 498 U.S. 881, 111 S.Ct. 221, 112 L.Ed.2d 177 (1990), referring to *Delong v. Commonwealth*, 234 Va. 357, 372, 362 S.E.2d 669, 677 (1987), *cert. denied*, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 263 (1988), we

compiled capital cases involving murders of police officers. *See Eaton, supra*. And, today in *Cardwell v. Commonwealth*, 248 Va. 501, 450 S.E.2d 146 (1994), we referred to those cases where, as here, the death sentences were based upon the vileness factor. From a consideration of all these cases, we conclude that the death sentence in this case is not excessive or disproportionate to the punishment generally imposed by juries in the Commonwealth for similar conduct.

Consequently, we hold the trial court committed no reversible error, and we have independently determined from a review of the entire record that the sentence of death was properly assessed. Thus, the judgment of the trial court will be

Affirmed.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

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trial would have been different with respect to guilt and/or sentence.

515. The trial court's error was substantial and had an injurious effect or influence in determining the outcome of Mr. Weeks' trial with respect to guilt and/or penalty.

XXVIII.

THE TRIAL COURT'S REFUSAL TO CLARIFY ITS IMPROPER AND CONFUSING INSTRUCTIONS REGARDING THE IMPOSITION OF A DEATH SENTENCE WHEN EXPRESSLY ASKED BY THE JURORS FOR CLARIFICATION DENIED MR. WEEKS' RIGHTS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

516. The substantive aspects of this claim are exhausted because they were presented on direct appeal; the ineffective assistance aspects of this claim are defaulted because they were not raised in state habeas. To the extent the claim was not adequately raised on direct appeal, the failure to exhaust is attributable to the ineffective assistance of trial/appellate counsel. The performance of trial/appellate counsel, both as a claim in its own right and as cause for the default of any part of the claim on direct appeal, may be addressed by this Court because of the due process violations in state habeas

proceedings, as described previously in this petition. This claim is evidenced by the following facts:

This claim is evidenced by the following facts: [sic]

517. All other allegations in this petition are incorporated into this claim by specific reference.

518. Mr. Weeks requested that jurors be accurately instructed that they could sentence Mr. Weeks to life imprisonment even though they may find unanimously and beyond a reasonable doubt one or both of the statutory aggravating circumstances. (Appendix at 901.) The trial court refused to instruct the jurors on this accurate statement of the law.

519. Instead, the trial court told jurors:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death; or, if you believe from all the evidence that the death penalty is not justified, the [sic] you shall fix the punishment of the defendant at life imprisonment, or imprisonment for life and a fine of a specific amount, but not more than $100,000.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment, or imprisonment for life and a fine of a specific amount, but not more than $100,000.

(Appendix at 2263-64.)

520. Although the jurors were given a written copy of this instruction as well as the jury verdict form, they interrupted their deliberations to ask expressly the trial court:

> If we believe that Lonnie Weeks, Jr., is guilty of at least one of the aggravating alternatives, then is it our duty as a jury, to issue the death penalty? or, must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty or one of the life sentences? What is the rule? Please clarify.

(Appendix at 2718.) Although the trial court still had available Mr. Weeks' proposed instruction and although the court knew or should have known that a Virginia jury never has a duty to impose a death sentence, he erroneously told jurors he could do no more than refer them back to the very instruction upon which they sought clarification. (Appendix at 2718.)

521. Mr. Weeks' instruction clearly was a correct statement of Virginia law. In Virginia, a person convicted of capital murder is not *eligible* for a death sentence as a threshold matter, unless the Commonwealth proves unanimously and beyond a reasonable doubt at least one of two statutorily-defined aggravating circumstances. Va. Code §§ 19.2-264.4.C. If the sentencer makes such a threshold finding, the person is eligible for a death sentence. After making this eligibility determination, the sentencer, in Mr. Weeks' case "[t]he jury[,] has the duty to consider all the evidence relevant to sentencing . . . *before determining* whether the defendant . . . should be executed." *Stamper v. Commonwealth*, 257 S.E.2d 808, 819 (Va. 1979), *cert. den.* 445 U.S. 972 (1980) (emphasis supplied).

In no circumstance, is a sentencer *required* to impose a death sentence. *Smith v. Commonwealth*, 219 Va. 455, 479, 248 S.E.2d 135, 150 (1978) *cert. denied*, 441 U.S. 967 (1979).

522. The trial court's instructions, which were the source of the jurors' confusion, were deficient because they told jurors that they could sentence Mr. Weeks to death based merely on a finding of the existence of one or more of the aggravating circumstances and because they were not instructed that they could sentence to life even though they had found the existence of an aggravating circumstance unanimously and beyond a reasonable doubt.

523. Clearly, under this first alternative –

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the Defendant at death

–jurors were expressly told that they were permitted to sentence Mr. Weeks to death merely by finding one of the aggravating circumstances. They need not even consider the second alternative. No reasonable juror could glean from this instruction that the death penalty was not permitted solely on the basis of a finding of an aggravating circumstance. The statutory finding forms in Virginia do not expressly provide for a finding of only one of the aggravating factors beyond a reasonable doubt and a sentence of life imprisonment; they are therefore violative of the principle enunciated in *Penry, supra*.

524. Even if the instructions might, hypothetically, be adequate to lead jurors through the proper process for

deciding whether to sentence a person to death or to life imprisonment, which Mr. Weeks does not concede, those instructions clearly were inadequate to accomplish that task for the jurors in Mr. Weeks' case. The jurors had the court's prior instructions and the verdict form at hand, and if they had been able to determine their options and their duties from those documents, they would not have asked the court for clarification. In the face of actual confusion by the jurors, it was unreasonable and a gross violation of Mr. Weeks' rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution for the court to refuse to give the jurors a straightforward and accurate answer to their plea for clarification. The judge's knowledge that at least some of the jurors believed they had a duty to sentence Mr. Weeks to death based solely on the finding of an aggravating factor, and without consideration of whether a life sentence was appropriate, made his error even more outrageous.

525. The court's error in failing to clarify the rule of law with accurate information in the face of juror confusion and misunderstanding, violated Mr. Weeks' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

526. The failure to present Mr. Weeks' proposed instruction C1 in answer to the jurors' question violated Mr. Weeks' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

527. The unreasonable action of the trial court had the effect of rendering the assistance of Mr. Weeks' counsel ineffective in the defense of Mr. Weeks, thereby violating Mr. Weeks' rights under the Sixth Amendment of the Constitution.

528. A reasonable probability exists that, absent counsel's deficient performance occasioned by the trial court's error, the outcome at trial would have been different with respect to guilt and/or sentence.

529. Alternatively, Mr. Weeks' trial counsel rendered ineffective assistance in the defense of Mr. Weeks by failing to make an adequate showing that the court's response to the jurors' question was inadequate to protect Mr. Weeks' rights. Counsel's ineffective assistance violated Mr. Weeks' rights under the Sixth Amendment to the Constitution. A reasonable probability exists that, absent counsel's deficient performance, the outcome at trial would have been different with respect to guilt and/or sentence.

530. The trial court's error was substantial and had an injurious effect or influence in determining the outcome of Mr. Weeks' trial with respect to guilt and/or penalty.

XXIX.

THE TRIAL COURT'S UNREASONABLE REFUSAL TO IMPOSE A LIFE SENTENCE DEPRIVED MR. WEEKS OF DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, AND A FAIR TRIAL AND SUBJECTED HIM TO CRUEL AND UNUSUAL PUNISHMENT UNDER THE UNITED STATES CONSTITUTION

531. The substantive aspect of this claim is exhausted because it was addressed on direct appeal; the ineffective assistance aspect of this claim is defaulted because it was not raised in state habeas. To the extent the substantive aspect of this claim was not adequately raised on direct appeal, the failure to exhaust is attributable to the ineffective assistance of trial/appellate counsel. The performance of trial/appellate counsel, in turn, may be addressed by this Court because of the due process violations in state habeas proceedings, as described previously in this petition. This claim is evidenced by the following facts:

This claim is evidenced by the following facts:

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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163.7, which mandates appointment of qualified state habeas counsel. Thus, even if Weeks did not have a Sixth Amendment right to state habeas counsel, he had a Fourteenth Amendment right to due process. The due process violation excuses the procedural default.

PRINCIPLES OF LAW AND ARGUMENT

I. ONCE THE JURY INFORMED THE TRIAL COURT THAT THEY WERE INTERPRETING THE INSTRUCTIONS TO SAY THEY WERE REQUIRED TO SENTENCE WEEKS TO DEATH UPON THE FINDING OF AN AGGRAVATING CIRCUMSTANCE, THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY CLEARLY THAT THEY WERE OBLIGED TO CONSIDER RELEVANT MITIGATING EVIDENCE BEFORE MAKING THEIR SENTENCING DETERMINATION CREATED A REASONABLE PROBABILITY THAT THE JURY INTERPRETED THE INSTRUCTIONS IN A WAY THAT PREVENTED THE CONSIDERATION OF CONSTITUTIONALLY RELEVANT EVIDENCE.

Weeks' jury received the standard Virginia Pattern Jury Instruction regarding the process by which to make its sentencing determination. (JA at 264.) Last term, the Supreme Court held that an identical instruction, on its face, did not foreclose the jury's consideration of any mitigating evidence, nor did it constrain the manner in which the jury was able to give effect to mitigation.

Buchanan v. Angelone, 118 S. Ct. 757, 762 (1998). Three justices dissented, reasoning that the language in paragraph 3 (which begins "If you find from the evidence . . . "), in the context of the entire instruction, could be misinterpreted by a jury to mean that evidence of mitigating circumstances is not relevant to their sentencing decision. *Id.* at 764-766 (Breyer, J., dissenting). The majority asserted that the instruction as a whole "presents a simple decision tree" and only a "strained parsing of the language" could lead to the misconception envisioned by the dissent. *Id.* at 762 n.4. Weeks' jury would have agreed with the dissent.

After having been given a written copy of the court's instructions and deliberating for nearly four hours, Weeks' jurors requested the court to "clarify" whether they were required to consider any mitigation evidence if they found Weeks guilty of even one aggravating factor:

> If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the aggravating alternatives, then is it our duty as a jury to *issue* the death penalty? Or must we *decide* (even though he is guilty of 1 of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify.

(JA at 256) (emphasis in original). Over trial counsel's objection[1], the trial court gave the jurors no further guidance, but instead referred them to the "second paragraph

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[1] Prior to deliberations, Weeks requested the jury be instructed:

> Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence

of instruction #2, (Beginning with "If you find from . . .)" which reads:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death; or, if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment, or imprisonment for life and a fine of a specific amount, but not more than $100,000.

(JA at 256; 264.) The jury went on to sentence Weeks to death. The transcript records that "a majority of the jurors [were] in tears" as they delivered their sentence. (JA at 2721.)

The jury's question was a simple one. It alerted the trial court that at least some of the jurors were interpreting the instructions in a way that was unquestionably unconstitutional. This question had one, simple, absolutely correct answer – an answer that the trial court failed to provide. This failure created a reasonable probability that the jury sentenced Weeks to death without considering the relevant mitigating evidence proffered in his behalf, in violation of the Eighth and Fourteenth

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> in mitigation by sentencing the Defendant to life in prison.

(JA at 261.) The trial court denied the instruction. (JA at 1254-55.) When the jury submitted its question, counsel renewed his request that the jury be provided with the proposed instruction.

Amendments to the Constitution of the United States. *Boyde v. California*, 494 U.S. 370 (1990).

A. Standard of Review

This issue was raised on direct appeal and summarily dismissed as meritless without any discussion by the Supreme Court of Virginia:

> In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of those issues and conclude that none has any merit.

(JA at 474-75.) Because the Virginia Supreme Court failed to make any findings of fact about this claim or to articulate any rationale for its adverse determination, this Court "cannot review that court's 'application of clearly established Federal law', but must independently ascertain" whether the trial court's failure to correct the jury's obvious confusion created a reasonable likelihood that Weeks' jury interpreted their instructions in such a way as to preclude their giving effect to the mitigating evidence put forth in Weeks' behalf. *Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir.1998). The standard of review, therefore, is equivalent to *de novo*. *Id.*

B. The Trial Court's Failure to Ensure Weeks' Jury Understood the Correct Legal Standard Created an Unacceptable Risk that the Jury Determined it Could Not Consider Mitigating Evidence

Ensuring that sentencers consider mitigation is a constitutionally indispensable aspect of the Eighth

Amendment's requirement that the state's capital sentencing scheme be free from the risk of arbitrariness and capriciousness condemned in *Furman v. Georgia*, 408 U.S. 238 (1972). In *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), the Court acknowledged that "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is . . . incompatible with the commands of the Eighth and Fourteenth Amendments." As the Court recognized in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), "it is not enough to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence." Under no circumstances may a sentencer be precluded from giving effect to proffered mitigating circumstances. It matters not whether the barrier to the consideration of mitigating evidence is the result of a state statute[2], jury instructions[3], an evidentiary ruling[4], prosecutorial argument[5], or the sentencing court.[6]

In *Boyde*, the Court held that the test for determining whether jury instructions satisfy these principles is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380; *see also, Johnson v. Texas*, 509 U.S. 350, 367-68

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[2] *Lockett, supra.*

[3] *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Penry*, 492 U.S. at 319; *Mills v. Maryland*, 486 U.S. 367 (1988).

[4] *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Green v. Georgia*, 442 U.S. 95, 99 (1979).

[5] *Penry*, 492 U.S. at 326.

[6] *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

(1993); *Buchanan*, 118 S.Ct. at 761. In making this determination, courts should consider the language of the challenged instruction in the context of the entire proceedings. *Boyde*, 494 U.S. at 373-74.

In this case, at the time the jury asked the question, there was indeed "a reasonable likelihood" that the jury intended to apply the instruction in a way that prevents the consideration of constitutionally relevant evidence. The jury's question specifically told the judge that it did not know whether it was even *permitted* to consider any mitigating evidence once it found the existence of an aggravating factor. The only question is whether the trial court's response to this question, which was simply to refer the jury to the original charge – i.e., to the instruction that was the source of the confusion – was sufficient to eliminate this possibility.

The District Court said that because the instruction was "constitutionally sufficient" on its face, the trial judge "could have reasonably assumed that the jury would understand their charge if their attention were brought to the specific instruction that governed their question." (JA at 2100.) The court also assumed that because the jury did not renew the question but proceeded to render a sentence, it must have correctly "understood the instruction and the governing law." (JA at 2100.)

The fact that an instruction is "constitutionally sufficient" on its face merely means that hypothetically reasonable jurors can be presumed to comprehend the instruction accurately. Absent specific evidence of confusion, courts may safely assume that the jurors understand

the charge and that they will apply the law correctly. But when particular jurors expressly indicate confusion, as they did here, the presumed understanding of hypothetical jurors can no longer be imputed to them.

The court addressed a strikingly similar situation in *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1575 (1998). McDowell's jury had sent a question to the judge indicating that it could not agree whether certain factors could be considered in mitigation. *Id.* at 835. The judge simply referred the jury back to what all parties agreed was a "technically flawless" instruction. *Id.* at 838. The *en banc* court reasoned that because the jury had failed to understand the instruction in the first instance, "it would be folly to presume . . . that in the end they got it right and followed the law." *Id.* at 839. Thus, that court concluded that the failure to correct the jury's obvious misunderstanding left a reasonable likelihood that the jury had incorrectly interpreted the instruction to preclude consideration of mitigating evidence, and it reversed McDowell's death sentence. *Id.* at 841. The circumstances in Weeks' case warrant the same conclusion.

First, the fact that the instruction at issue was found "constitutionally sufficient" on its face in *Buchanan* is not relevant to the resolution of Weeks' claim. *This* jury was prepared to interpret the instruction in an unconstitutional manner. While referring a jury back to an instruction may be reasonable in some circumstances, no likelihood exists that this was an instance where the jury had merely failed to focus upon the proper instruction to resolve their difficulty. The penalty phase instructions were short, and only one of those instructions described

the process by which jurors were to arrive at a sentencing determination. Having pored over the written instructions for nearly four hours, there was no reason for these jurors to inquire whether they were permitted to consider mitigating evidence if they understood the instruction as given. Weeks' jury found the instruction confusing and misleading and "the error is not cured by a prior unexceptional and unilluminating abstract charge." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946).

Moreover, while the fact that the jury did not renew their question and eventually arrived at a sentencing determination may indicate that the jury resolved their question – it hardly demonstrates that the jury unanimously determined to interpret the instruction *correctly*.[7] The jury at least as likely unanimously determined that their "duty" was to sentence Weeks to death upon the finding of an aggravating circumstance, without consideration of mitigating evidence. The ultimate sentence – death – does not indicate otherwise. Nor does the fact that the jury, upon sentencing Weeks to death, left the courtroom weeping. Indeed, these facts make it *more* likely that the jury ultimately resolved the question in an unconstitutional manner.

Had the jury been resolved to sentence Weeks to death even after considering the mitigating evidence

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[7] The jury had twice asked the trial court for clarification, first regarding Weeks' parole eligibility and then whether it was their "duty" to impose the death sentence after finding an aggravating factor. After receiving no clarification to either question, that the jurors would have considered returning to the trial court with a repeat of their second question is unlikely.

before it, there was no reason to bother with the question. The only possible reason to interrupt deliberations to ask this question was if the answer would make a difference. The only difference it could have made was a determination, in the mind of at least one juror, that there were mitigating circumstances and that Weeks should not be sentenced to death. Such a determination by even one juror would have resulted in a life sentence. Va. Code § 19.2-264.4

"[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Bollenbach*, 326 U.S. at 612 (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)). For this reason, "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Id.* at 612-13. The jurors' question alerted the court to the very real possibility that they would impose the death penalty without considering mitigating evidence. The answer here was easy and controlled by a clearly established and long-standing constitutional requirement as articulated by the Supreme Court.

The judge could have easily and accurately resolved the jury's misunderstanding by giving Weeks' proposed instruction. That instruction correctly stated the law and was responsive to the jurors' question. In fact, the District Court said, "Weeks' proposed jury instruction is certainly a clearer statement of the law than the instruction actually given to the jury." (JA at 2096.)

The judge could have also resolved the misunderstanding by simply answering the question: "No" (it is

not your duty to impose the death penalty just because you find Weeks guilty of at least one of the alternatives); and "Yes" (you must decide, even if he is guilty of one of the alternatives, whether or not it is appropriate to impose the death penalty or one of the life sentences). Merely referring the jury back to an instruction that it did not understand in the first place did nothing to dispel the jurors' obvious confusion as to whether they were permitted to consider Weeks' mitigating evidence once they found an aggravating factor. By effectively withholding from the jury the correct standard by which they were to reach a sentencing determination, the trial court unconstitutionally diminished the reliability of the jury's decision.

For the foregoing reasons, there can be no assurance that Weeks' jury took into account "factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605. Thus, under clearly established law as decided by the Supreme Court, "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380, *Buchanan*, 118 S. Ct. at 761. Accordingly, Weeks' death sentence should be vacated and this case remanded for a new penalty phase.

II. THE TRIAL COURT'S REFUSAL TO APPOINT BALLISTICS AND PATHOLOGY EXPERTS DEPRIVED WEEKS OF HIS CONSTITUTIONAL RIGHTS.

A. This Claim Was Presented but Not Adjudicated on the Merits in State Court

The trial court's unreasonable refusal to appoint ballistics and forensic pathology experts to

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
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I. THERE IS A REASONABLE LIKELIHOOD THAT WEEKS' JURY APPLIED THE PENALTY INSTRUCTIONS IN A WAY THAT PREVENTED CONSIDERATION OF CONSTITUTIONALLY RELEVANT MITIGATING EVIDENCE

A. Weeks' Claim is Not Procedurally Barred

Respondent's contention that the state court made an "explicit rejection of assignment of error no. 44 . . . as procedurally defaulted," Resp. Br. at 11 n.1, is false. On direct appeal, the state court addressed this claim not once, but twice. On both occasions, the court rejected Weeks' 44th Assigned Error *on the merits*. There is no procedural bar, as the district court correctly concluded.

First, the Virginia Supreme Court stated, "[Weeks] effectively presents no argument in support of five other alleged errors (Nos. 16, 34, 44, 45 and 46)." *Weeks v. Commonwealth*, 540 S.E.2d at 379, 383 (Va. 1994). Respondent fails to mention that the court immediately went on to conclude, "[w]e have considered these so-called arguments and *find no merit* in any of the five." *Id.* (emphasis supplied). Thus, even if the state court could have barred the claims for failure to present an adequate argument, it plainly did not do so. *See Harris v. Reed*, 489 U.S. 255 (1989) (where state court chose not to impose procedural bar, federal court must address merits.)

At the conclusion of its opinion, the state court again addressed Error 44, and again concluded that the claim had no merit:

> In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and *inquiries by the jury during its deliberations*. We have considered all the arguments in support of those issues and conclude that none has any merit.

Weeks, 540 S.E.2d at 390 (emphasis supplied). Weeks' jury only "inquired" twice, and there were only two issues raised on appeal concerning an inquiry by the jury (Assignments of Error 43 and 44). Because the court specifically used the plural and stated it was resolving issues dealing with "inquiries," the court must have been addressing both issues. Indeed, such was the conclusion of the district court, which reviewed Weeks' claim on the merits. (JA 2099.)[1]

B. Weeks Is Not Asking the Court to Create a "New Rule"

Respondent also asserts, for the first time on appeal, that Weeks' claim calls for this Court to establish a "new rule" under *"Teague* and its progeny." Resp. Br. at 12. The

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[1] Respondent also appears to assert, for the first time on appeal, that Petitioner's claim was not fairly presented in the state courts. Resp. Br. at 11. However, this assertion is so vague and conclusory that it fails to divulge what "legal and factual claims" Respondent believes are "newly advanced" in federal habeas proceedings. Thus, Weeks cannot reasonably respond to this argument and this Court should not address it.

crux of this argument appears to be that because the instructions and circumstances of Weeks' trial were similar to those later considered by the Supreme Court in *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), only a "new rule" would entitle Weeks to relief. If Buchanan was not seeking to establish a new rule, and he was not, then *a fortiori* Weeks is not. *Compare* Respondent's Supreme Court Brief in *Buchanan v. Angelone*, 1997 WL 476496 at ** 37-45 (arguing as threshold matter that Buchanan is not entitled to relief under "new rule" doctrine), *with Buchanan v. Angelone*, 118 S. Ct. 757 (1998) (declining to apply "new rule" principles and deciding issue on merits).

Weeks, like Buchanan, merely seeks the application of a clearly established rule – the sentencing jury in a capital trial may not be precluded from considering relevant mitigating evidence – *to the particular circumstances of his case. See Id.*, 118 S. Ct. at 761-62 (applying those "constitutional principles" dictated by *Lockett, Eddings, Penry* and *Boyde* to the particular circumstances of Buchanan's trial). The Supreme Court's approval of the sentencing instructions in *Buchanan* does not preclude this Court from considering Weeks' claim any more than the Court's approval of the Texas jury instructions in *Jurek v. Texas*, 428 U.S. 262 (1976), precluded Penry from obtaining relief based on a similar claim nearly a decade ago. *Penry v. Lynaugh*, 492 U.S. 302, 316 (1989) (claim that assurances of *Lockett* and *Eddings* were not fulfilled under particular circumstances of Penry's case is not a "new rule.").

Moreover, in comparing the circumstances of Weeks' case to those present in Buchanan's case, Respondent

omits one rather significant dissimilarity: after four hours of deliberation Weeks' jury actually told the court they were, in fact, considering interpreting the instructions in an unconstitutional manner.[2] This was not the case with Buchanan's jury. Indeed, the Court made clear in *Buchanan* that its ruling was predicated on the absence of any proof of juror confusion. *Buchanan*, 118 S. Ct. at 763.

Weeks is not asserting, as Respondent suggests, that a trial court *per se* acts unconstitutionally by referring the jurors to previously given instructions. Rather, Weeks' claim is that, when the jury informed the court they thought the rule might be that they had a "duty" to sentence Weeks to death upon finding one of the aggravating factors, there was "a reasonable likelihood that the jurors in petitioner's case understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner," and that the trial court's response was insufficient under the circumstances to dispel the possibility. *Boyde v. California*, 494 U.S. 370, 386 (1990). Although this may only be a matter of phrasing, "phrasing mirrors thought, [and] it is important that the phrasing not obscure the true issue before a federal court." *Brown v. Allen*, 344 U.S. 443, 501 (1953).

The jury's inquiry and the trial court's response are circumstances, unlike those in *Buchanan*, which evince a

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[2] Respondent does mention the fact that the jury asked a question in a footnote to his argument. However, Respondent attempts to diminish its significance by characterizing it as "merely . . . a question about its sentencing options." Resp. Br. at 15 n. 3. The language of the jury's question, which is quoted in full in Weeks' opening brief, speaks for itself.

violation of the well-established constitutional rule Weeks sought to be applied. *See Simmons v. South Carolina*, 114 S. Ct. 2187, 2197 n.10 (1994) ("It almost goes without saying that if the jury in this case understood . . . the 'plain meaning' [of the terms in the instruction] there would have been no reason for the jury to inquire [as to their meaning]."); *id.* at 2199 (Souter, J., concurring) ("It is . . . clear that at least one of these particular jurors did not understand the meaning of the term, since the jury sent a note to the judge asking [the court to define the term]."); *id.* at 2201 (Ginsberg, J., concurring) ("that the jury in this case felt compelled to ask" about the meaning of the instruction "shows" that the jurors did not understand the term).[3]

C. The Error Was Not Harmless

In *Calderon v. Coleman*, ___ S. Ct. ___, 1998 WL 856120 (Dec. 14, 1998) (per curiam), the Court remanded a case to the court of appeals because the lower court, after determining that an erroneous jury instruction was unconstitutional under *Boyde*, failed to assess whether the error was harmless. Weeks does not concede that *Coleman* applies to the circumstances of his case, but in an abundance of caution he shows that the error in his case "ha[d] a substantial and injurious effect or influence on the jury's sentence of death." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

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[3] Respondent's related attempt to derail Weeks' claim under 28 U.S.C. § 2254(d) is unavailing. Under this Court's decision in *Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998), review of this claim must be equivalent to *de novo*.

The decision in *Simmons* established that inquiries from juries indicate that some jurors do not understand their instructions. 114 S. Ct. at 2197 n.10. As explained above and in Weeks' principal brief, there would be no logical reason for jurors to seek clarification unless resolution of the questions would make a difference in the outcome. Thus, Weeks offers compelling proof that the error had a substantial and injurious effect or influence on the jury's decision: the jurors said so.

Unlike the circumstances in *Coleman*, where the error was very attenuated,[4] the error in Weeks' case went to the heart of the sentencing decision. At least one juror must have found an aggravating factor but nonetheless concluded that Weeks should be sentenced to life imprisonment – otherwise, an answer to the jury's question would not have made any difference and they would not have sought clarification. For the reasons shown in Weeks' principal brief, we cannot presume that the jury, left on its own, correctly determined that it did *not* have a duty to impose death and that it was prohibited from imposing a death sentence without each juror first considering the

[4] In *Coleman*, the jury was instructed that the governor of California is empowered to commute a life sentence without the possibility of parole to a lesser sentence that includes the possibility of parole. The federal court granted habeas relief because the jury was not also told that the governor could not commute the sentence of a twice-convicted felon like Coleman without the approval of four judges of the California Supreme Court. In the context of future dangerousness, this omission purportedly prevented the jury from giving due effect to Coleman's mitigating evidence.

mitigating evidence. Indeed, even Respondent does not suggest that the jury could perform such a feat.

II. WEEKS' CLAIM THAT HE WAS UNCONSTITUTIONALLY DENIED THE ASSISTANCE OF EXPERTS IS NOT DEFAULTED, IS NOT BARRED BY THE "NEW RULE" DOCTRINE, AND IS NOT HARMLESS ERROR

In his 12th Assigned Error on direct appeal, Weeks presented his federal claim to the Virginia Supreme Court: "The court's denial of the defendant's request for funding for expert assistance in the fields of pathology and ballistics constituted a violation of the defendant's rights guaranteed by . . . the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States." (JA at 428.) Respondent's contention that Weeks advanced no such federal claim on direct appeal is thus demonstrably wrong. The state court simply did not adjudicate the merits of Weeks' properly presented claim and instead addressed only Weeks' separate claim concerning the right to proceed *ex parte*. *See Smith v. Digmon*, 434 U.S. 332, 333 (1978) (federal claim is exhausted if presented to state's highest court, regardless whether state court chooses not to address merits).[5] Using an artfully truncated quote, Respondent makes *Adams v. Robertson*, 117

[5] *Digmon* refutes Respondent's argument that when the state court fails to adjudicate a properly presented claim, the defendant *must* move for rehearing. When state law makes a motion for rehearing discretionary, "[t]here is no requirement that a litigant petition for rehearing after an appellate court issues a final decision . . . in order to preserve his right to pursue federal habeas relief. . . . 'The decision of the [state's highest court] was final state action, without a useless motion for

S. Ct. 1028 (1997), appear to say the opposite of what the Court held. Read in full, *Adams* supports Weeks' position:

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption *by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here."* We have described in different ways how a petitioner may satisfy this requirement. In some cases, we have focused on the need for petitioners either to establish that the
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discretionary review.' " *Tuggle v. Seabold*, 806 F.2d 87, 91 (6th Cir. 1986) (quoting *Freeman v. Commonwealth*, 697 S.W.2d 133, 134 (Ky. 1985)).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
[Caption Omitted In Printing]

* * *

Pursuant to United States Supreme Court Rule 23(3) and Local Rule 22(b) of the Rules of the United States Court of Appeals for the Fourth Circuit, Appellant Lonnie Weeks, Jr., by counsel, hereby moves this Court to recall its mandate and to issue an order staying Weeks' execution, which is scheduled for September 1, 1999, until the Supreme Court enters final judgment or denies Weeks' application for writ of certiorari. Counsel for Mr. Weeks has notified opposing counsel of the intended filing of the motion. Opposing counsel has not consented to the granting of the motion and likely will file a response in opposition to the motion. As grounds and support for this motion, Weeks states as follows:

In his petition for writ of certiorari, Weeks will ask the Supreme Court to determine whether a trial court has a duty under the Eighth and Fourteenth Amendments to clarify a jury's explicit confusion about the meaning of a facially constitutional instruction in order to obviate the likelihood that the jury will conduct its task improperly and apply the sentencing instruction in a way that precludes consideration of constitutionally relevant mitigating evidence.

This application is governed by the familiar criteria set out in *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Barefoot* requires an applicant to show (i) a reasonable probability that four Members of the Court will consider the issues raised in the petition sufficiently meritorious for a grant

of certiorari, (ii) the significant possibility that the Court will reverse the decision below, and (iii) that irreparable harm will occur if the execution is not stayed. *Id.*, 463 U.S. at 895.

I. There Is a Reasonable Probability That Four Members of the Court Will Consider the Issue Raised in Weeks' Petition Sufficiently Meritorious for a Grant of Certiorari

There are at least two reasons why there is a reasonable probability that four Members of the Court will vote to grant certiorari to decide whether a trial court is bound by the Constitution to clarify a capital sentencing jury's explicit confusion over its instructions. First, this case presents an important and unresolved question of federal law that was raised by three dissenting justices of the Court in *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), and the question should be settled by the Court. Second, there is a split in the Circuit Courts of Appeals regarding whether a trial court must clarify a capital jury's confusion over its instructions in order to prevent the likelihood that the jurors will apply the instruction in a way that precludes their consideration of mitigating evidence.

In *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), the Court held that a capital sentencing instruction almost identical to the one used by Weeks' jury did not, on its face, foreclose the jury's consideration of any mitigating evidence. 118 S. Ct. at 762. The Court reasoned that, after two days of hearing mitigating evidence presented by Buchanan, "it is not likely that the jury would disregard this extensive testimony in making its decision. . . . " *Id.*

Thus, the Court concluded *"[i]n this context* 'there is not a reasonable likelihood that the jurors *in the petitioner's case* understood the challenged instructions to preclude consideration of relevant mitigating evidence. . . . " *Id.* at 763 (emphasis added). Significantly, the context of the proceedings in *Buchanan* reveal that there was no explicit confusion over the instructions expressed by the jury. An important question not directly addressed by the majority in *Buchanan* is whether a trial court is bound by the Constitution to clarify a jury's explicit confusion over its constitutionally-sufficient instructions.

Three justices dissented from the majority's opinion in *Buchanan*, reasoning that Virginia's capital sentencing instruction was capable of being misinterpreted by a jury to mean that evidence of mitigating circumstances is not relevant to their sentencing decision once the jury finds the presence of one of the statutory aggravating factors. *Id.* at 764-766 (Breyer, J., dissenting). Precisely the misunderstanding predicted by the dissenters in *Buchanan* has arisen in Weeks' case.

Weeks' jurors asked the judge for clarification of the rule of law.[1] Without giving the jurors any further concrete guidance or clarification of the rule of law the judge simply referred them back to the instruction which was

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[1] The question posed by the jury to the court reads: "If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the aggravating alternatives, then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of 1 of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify." (R. at 256 and 1342-43) (emphasis in original.)

the source of their confusion. The jury's inquiry and the trial court's response are circumstances, dramatically unlike those in *Buchanan*, which reveal a violation of the well-established constitutional rule Weeks sought to be applied; a capital jury may not be precluded from considering constitutionally-relevant mitigating evidence. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978). There is a reasonable probability that four Members of the Court will vote to grant certiorari in order to answer this important question of federal law.

There is also a reasonable probability that four Members of the Court will vote to grant certiorari because there is a split in the circuits regarding whether a trial court must clarify a jury's manifest confusion over technically flawless instructions in order to prevent the likelihood that the jurors will apply the instruction in a way that precludes their consideration of mitigating evidence. In *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1575 (1998), the Ninth Circuit was faced with the same constitutional question regarding jury confusion as the Fourth Circuit. Weeks discussed the *McDowell* decisions at length in his briefs, but this Court's Opinion ignored the *McDowell* precedent. The Fourth Circuit's ruling directly conflicts with

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Lonnie WEEKS, Jr., Petitioner-Appellant,

v.

Ronald J. ANGELONE, Director of the Virginia Department of Corrections, Respondent-Appellee.

No. 98-21.

United States Court of Appeals, Fourth Circuit.

Argued March 1, 1999.

Decided May 10, 1999.

ARGUED: Timothy Meade Richardson, Huff, Poole & Mahoney, P.C., Virginia Beach, Virginia, for Appellant. Robert H. Anderson, III, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellee. **ON BRIEF:** Glen A. Huff, Huff, Poole & Mahoney, P.C., Virginia Beach, Virginia; Sterling H. Weaver, Sr., Portsmouth, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellee.

Before WILKINSON, Chief Judge, and HAMILTON and WILLIAMS, Circuit Judges.

Application for a certificate of appealability denied and petition dismissed by published opinion. Judge WILLIAMS wrote the opinion, in which Chief Judge WILKINSON and Judge HAMILTON joined.

OPINION

WILLIAMS, Circuit Judge:

On October 21, 1993, a Commonwealth of Virginia jury convicted Lonnie Weeks, Jr., of the capital murder of Virginia State Trooper Jose Cavazos. Following the jury's determination that Weeks's conduct satisfied the "vileness" aggravating factor, the trial court sentenced Weeks to death. After exhausting all available state remedies, Weeks petitioned the United States District Court for the Eastern District of Virginia for habeas corpus relief. *See* 28 U.S.C.A. § 2254 (West 1994 & Supp.1998). The district court dismissed his petition. Weeks subsequently filed an application for a certificate of appealability with this Court raising numerous constitutional claims of error. Weeks argues, *inter alia*, that the trial court's refusal to clarify its capital sentencing instruction to the jury after they indicated confusion with the instruction prevented the consideration of relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments, that the trial court's refusal to appoint ballistics and pathology experts violated his due process rights under the Fourteenth Amendment, and that the Supreme Court of Virginia's refusal to suppress his confession to the murder of Trooper Cavazos violated his Fifth and Fourteenth Amendment rights. After reviewing the record and briefs and hearing oral argument, we conclude that Weeks has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253(c)(2) (West Supp.1998). Accordingly, we deny his application for a certificate of appealability and dismiss his petition.

I.

The undisputed facts of this case, as recited by the Supreme Court of Virginia, are as follows:

> In early February 1993, [Weeks], who was age 20, a North Carolina resident, and on probation for a 1992 drug conviction, participated in the burglary of a residence in the Fayetteville, North Carolina area. During the course of that crime, [Weeks] obtained a set of keys to a 1987 Volkswagen Jetta automobile parked at the residence, and stole the vehicle. Later that month, [Weeks] drove the vehicle to Washington, D.C., intending to sell it or trade it for drugs. [Weeks] carried in the vehicle a Glock Model 17, nine millimeter, semi-automatic pistol loaded with hollow-point bullets. According to the testimony, the bullets were designed for police use, not target practice or hunting; this type of bullet is referred to as a "man stopper."
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> During the late evening of February 23, [Weeks] was riding as a passenger in the vehicle being driven by his uncle, 21-year-old Lewis J. Dukes, Jr., a resident of the District of Columbia. The pair was traveling en route from Washington to Richmond southbound on Interstate Route 95.
>
> Around midnight, Trooper Cavazos was operating radar from his marked police vehicle parked in the highway medium monitoring southbound traffic. The Volkswagen driven by Dukes passed the trooper's position at a high rate of speed. The officer activated his vehicle's emergency lights and proceeded to chase the vehicle occupied by [Weeks]. After traveling a brief distance, and passing other vehicles by

driving on the right shoulder of the highway, Dukes brought the car to a stop on the Dale City exit ramp, in a dark, remote area.

The trooper pulled his patrol car to a stop behind the Volkswagen, which he approached on foot on the driver's side. Upon the officer's request, Dukes alighted and was standing toward the left rear of the Volkswagen when the trooper asked [Weeks] to step out of the vehicle.

[Weeks] complied with the officer's request and alighted on the right side of the vehicle as the trooper was near the left side. As [Weeks] left the vehicle he was carrying the fully loaded pistol. He then fired at least six bullets at the officer, two of which entered his body beside the right and left shoulder straps of the protective vest the trooper was wearing. The officer was immediately rendered unconscious and fell to the pavement, dying within minutes at the scene with his police weapon in its "snapped" holster.

[Weeks], with Dukes as a passenger, then drove the Volkswagen from the scene and parked it on the lot of a nearby service station. [Weeks] returned to the scene of the crime on foot and retrieved Dukes' District of Columbia driver's license that had been dropped on the pavement. [Weeks] rejoined Dukes, and they were found by police shortly thereafter in the parking lot of a nearby motel.

. . . .

About 2:45 a.m., after [Weeks] had been with [the Prince William County police officer who had first encountered Weeks in the motel parking lot] for about two hours, state police officers arrived to question [Weeks] and Dukes.

Near 3:00 a.m., state police Special Agent J.K. Rowland met [Weeks] in the motel lobby. Rowland "explained to him that he was not under arrest" and asked [Weeks] "if he would like to talk . . . about what he had seen up on Interstate 95." [Rowland], who . . . testified [that Weeks] was "free to leave at that time," conducted an interview with [Weeks] in private in one of the motel rooms.

. . . .

[A]s Rowland questioned [Weeks] in the motel room, Rowland became "more and more suspicious" of [Weeks]. Even though [Weeks] "was free to leave" at that point, Rowland advised [Weeks] of his constitutional rights according to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as a precaution at 7:40 a.m. [Weeks] then exercised his right to remain silent and wrote, "Do not want to discuss case any further," on the "Advice of Rights" form that he signed. Rowland honored this request, and ceased questioning.

At 7:50 a.m., Rowland was advised by another investigator that Dukes had just stated that [Weeks] shot the trooper. Rowland arrested [Weeks] at 7:52 a.m.

Subsequently, [Weeks] was taken before a magistrate and then to the Adult Detention Center in Manassas. Later that morning, classification officers in the jail routinely questioned [Weeks] about his physical and mental state; no attempt was made to elicit information about the crime. During the interview, [Weeks] indicated that he was considering suicide because he had shot the trooper. [Weeks] also voluntarily

wrote a letter to a jail officer admitting the killing and expressing remorse. [Weeks] does not contest either of these admissions but attacks the constitutional validity of the following interview.

Near 6:00 p.m. on February 24, [Weeks] was brought to the lounge of the local prosecutor's office where Rowland again interviewed him; additional information had been developed by the police during the day between the termination of the first interview and the beginning of the second interview. Rowland asked [Weeks], "Do you remember the rights I read to you earlier today?" to which [Weeks] responded affirmatively. Rowland proceeded "to summarize the investigation through the course of the day's events to that point in time."

Among other things, Rowland told [Weeks] that an eyewitness to the shooting had made a positive identification of him as the assailant. A witness actually had identified [Weeks] as a person she saw at the scene after the homicide, but she had not witnessed the shooting. At the conclusion of Rowland's summary, he said to [Weeks], "This is your opportunity to provide your explanation as to what happened at the shooting scene." [Weeks] responded, "Yes, I was packing." The officer knew that "packing" meant "carrying a firearm."

[Weeks] then confessed to the trooper's murder. [Weeks] stated that when the trooper asked him to get out of the Volkswagen, he picked up the pistol and "thought about throwing it away." Instead, he saw the trooper put his hand down toward his service revolver. [Weeks] said he then "panicked" and shot the victim

"several times rapidly." [Weeks] stated that he drove, with Dukes as a passenger, to the service station, placing the pistol under the front floor mat of the Volkswagen. This interview lasted about one hour during which [Weeks] readily answered questions and did not invoke his right to remain silent or any other constitutional right.

Weeks v. Commonwealth, 248 Va. 460, 450 S.E.2d 379, 382-86 (Va.1994).

After a jury trial in the Circuit Court of Prince William County, Virginia, Weeks was convicted of the capital murder of Cavazos pursuant to Va.Code Ann. § 18.2-31(6) (Michie Supp.1998).[1] Based on its finding – made during the sentencing phase of Weeks's trial – that Weeks's conduct was outrageously or wantonly vile in that it involved depravity of mind and/or aggravated battery to the victim beyond the minimum necessary to commit the murder, *see* Va.Code.Ann. § 19.2-264.4(C) (Michie 1995), the jury recommended that Weeks be sentenced to death. After conducting a post-trial hearing pursuant to Va.Code. Ann. § 19.2-264.5 (Michie 1995), the Circuit Court of Prince William County followed the jury's recommendation and sentenced Weeks to death. On direct appeal, the Supreme Court of Virginia upheld Weeks's conviction and death sentence. *See Weeks*, 248 Va. 460, 450

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[1] Weeks also pleaded guilty to the use of a firearm in the commission of a murder and a related grand larceny charge, pursuant to Va.Code Ann. §§ 18.2-53.1 and 18.2-95 (Michie 1996 & Supp.1998), respectively, for which he was sentenced to a total of thirteen years in prison. These charges are not at issue on appeal.

S.E.2d 379. The Supreme Court of the United States denied Weeks's petition for a writ of certiorari. *See Weeks v. Virginia*, 516 U.S. 829, 116 S.Ct. 100, 133 L.Ed.2d 55 (1995).

Weeks requested that the Circuit Court of Prince William County appoint counsel to assist him in preparing a state habeas petition. On October 10, 1995, the circuit court granted this request and Weeks's state habeas counsel filed a petition for habeas corpus. On December 1, 1995, state habeas counsel withdrew the petition from the circuit court after learning on that day that the appropriate court with which to file the petition was the Supreme Court of Virginia, because that court has sole jurisdiction over habeas petitions in death-sentence cases. State habeas counsel immediately mailed the petition by regular mail to the Supreme Court of Virginia on December 1, the last day for filing. The petition was filed on December 4, 1995.

On January 11, 1996, the Commonwealth filed a motion to dismiss Weeks's petition as jurisdictionally barred due to untimeliness under Va. Code § 8.01-654.1 and Rule 5:7A(a) of the Rules of the Supreme Court of Virginia. In its motion, the Commonwealth argued that the petition was not timely filed because the Supreme Court of Virginia does not accept pleadings sent in the mail on the last day for filing unless they are sent by certified or registered mail. On that same day, the Commonwealth also filed a motion to dismiss the petition on substantive grounds. On March 15, 1996, the Supreme Court of Virginia dismissed the petition as jurisdictionally barred due to untimeliness.

On April 11, 1996, Weeks filed a petition for rehearing with the Supreme Court of Virginia. Weeks subsequently filed a purportedly *pro se* motion seeking the dismissal of his state habeas attorney for an alleged conflict of interest and leave to file a second habeas petition after the appointment of new counsel. That motion was denied by the Supreme Court of Virginia on May 31, 1996. One week later, on June 7, 1996, the Supreme Court of Virginia denied Weeks's petition for rehearing. On June 28, 1996, the Circuit Court of Prince William County entered an order setting Weeks's execution for August 19, 1996.

On August 14, 1996, Weeks filed a motion in the United States District Court for the Eastern District of Virginia requesting appointment of counsel, a stay of execution, and leave to proceed *in forma pauperis*. These motions were granted. Weeks was ordered to file his petition for writ of habeas corpus on or before February 7, 1997.

Weeks submitted his petition for a writ of habeas corpus in the district court on February 7, 1997. The matter was referred to a magistrate judge for the preparation of a report and recommendation pursuant to 28 U.S.C.A. § 636(b)(1)(B) and (C) (West 1993) and Rule 72(b) of the Federal Rules of Civil Procedure. On July 30, 1997, the magistrate judge filed a report and recommendation, recommending that the petition be denied and dismissed. By opinion and final order of April 1, 1998, the district court granted the Commonwealth's motion for summary judgment and denied and dismissed Weeks's petition for a writ of habeas corpus in its entirety. *Weeks v. Angelone*, 4 F.Supp.2d 497 (E.D.Va.1998). On April 15, 1998, Weeks

moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). The district court denied this motion on June 19, 1998. On July 17, 1998, Weeks filed a timely notice of appeal. On October 16, 1998, Weeks filed an application for a certificate of appealability with this Court pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure.

On appeal, Weeks contends that he is entitled to habeas relief on the following grounds: (1) the trial court's failure to instruct the jury clearly that they were obliged to consider relevant mitigating evidence before making their sentencing determination created a reasonable probability that the jury interpreted the sentencing instructions in a way that prevented the consideration of constitutionally relevant evidence; (2) the trial court's refusal to appoint ballistics and pathology experts deprived him of his constitutional rights; (3) the trial court's failure to suppress evidence derived in violation of his Fifth Amendment right against self-incrimination deprived him of due process; (4) Rule 5:25 is not an adequate procedural bar to his claims that were not raised at trial; (5) the fifty-page brief limit imposed by the Supreme Court of Virginia excuses the procedural default of claims not briefed on direct appeal; and (6) his state habeas counsel's conflict of interest constituted a violation of due process that excused the procedural default of his ineffective-assistance-of-trial-counsel claims. We address Weeks's arguments in turn.

II.

The parties agree that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, governs this case.[2] For a claim that was adjudicated on the merits in state court proceedings, this Court will not issue a writ of habeas corpus under the AEDPA unless (a) the state court decision is in "square conflict" with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998). "In other words, *habeas* relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.* When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits, however, our review of questions of law and mixed questions of law and fact is de novo. *See*

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[2] The AEDPA prohibits federal habeas relief on any claim "adjudicated on the merits in State court proceedings," unless that adjudication resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254(d) (West Supp.1998).

Jones v. Jones, 163 F.3d 285, 299-300 (5th Cir.1998) (applying pre-AEDPA de novo standard of review to claims of ineffective assistance of counsel that were properly raised, but not adjudicated on merits in state court).

III.

First, Weeks argues that the trial court prevented the jury from considering relevant mitigating evidence in violation of *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). Specifically, Weeks points to the failure of the trial court, in response to a specific jury request for clarification, to instruct the jury clearly that it was not required to sentence Weeks to death upon finding at least one aggravating factor. In *Boyde*, the Supreme Court held that the proper inquiry into whether capital jury instructions satisfy the Eighth Amendment requirement that a sentencer give effect to mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

A.

During the penalty phase of Weeks's trial, the trial court gave the jury a lengthy sentencing instruction (Instruction # 2).[3] The trial court denied Weeks's proffered instruction, C1, which instructed the jury that it had

[3] Instruction # 2 read as follows:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than $100,000. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> 1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> 2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

(J.A. at 264.)

the option to give effect to the mitigating evidence and sentence Weeks to life in prison even if it found the

Commonwealth had proved one or both of the aggravating factors beyond a reasonable doubt. During its penalty phase deliberations, the jury asked the court whether it was their duty to issue the death penalty if they found that Weeks was guilty of one of the aggravating factors, or whether they must decide whether or not to issue a death sentence even after finding that one of the aggravating factors had been met. Rather than issuing a clarifying instruction, the trial court instructed the jury by written response to see the second paragraph of Instruction # 2, which read as follows:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you *may* fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you *shall* fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

(J.A. at 264 (emphases added).) The trial court overruled Weeks's objection and request that the jury be instructed that it could impose a life sentence upon finding one or both aggravating factors based upon its belief that the jurors "just have to be drawn to that paragraph to find their answer." (J.A. at 1344.) Following several more hours of deliberation, the jury sentenced Weeks to death.

The Supreme Court of Virginia rejected Weeks's claim, contained in assignment of error no. 44, that the trial court's actions prevented the jury from considering relevant mitigating evidence on the ground that Weeks

"effectively presents no argument in support of" his claim. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 383 (1994). The Commonwealth argues that this dismissal is procedural and that Weeks has procedurally defaulted any objection to the trial court's response to the jury's question about its sentencing options.

We disagree with the Commonwealth's characterization. First, in the sentence at the end of the same paragraph that states that Weeks "effectively presents no argument in support of," *inter alia*, assignment of error no. 44, the Supreme Court of Virginia concluded, "We have considered these so-called arguments and *find no merit* in any of [them]." *Id.* (emphasis added). Second, the Supreme Court of Virginia stated the following near the end of its opinion: "[D]efendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of these issues and conclude that *none has any merit*." *Id.* at 390 (emphasis added). Because Weeks's jury made two inquiries and Weeks's brief to the Supreme Court of Virginia made two assignments of error (nos. 43 and 44) regarding the court's response to jury instructions, the Supreme Court of Virginia's use of the term "inquiries," must have referred to both assigned errors nos. 43 and 44. The Supreme Court of Virginia therefore adjudicated assigned error no. 44 on the merits, allowing us to review this claim in a federal habeas proceeding.[4] *See Wright v.*

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[4] The district court also concluded that the Supreme Court of Virginia dismissed this claim on the merits. *See Weeks v. Angelone*, 4 F.Supp.2d 497, 536 (E.D.Va.1998).

Angelone, 151 F.3d 151, 156-57 (4th Cir.1998) (holding that a perfunctory decision constitutes an adjudication on the merits).

Where, as here, the state supreme court has adjudicated a claim on the merits but has given no indication of how it reached its decision, a federal habeas court must still apply the AEDPA standards of review. *See id.* A state court's perfunctory decision is reasonable if it " 'is at least minimally consistent with the facts and circumstances of the case.' " *Id.* at 157 (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 72, 139 L.Ed.2d 32 (1997)). Therefore, the writ will not issue unless we determine that the Supreme Court of Virginia's disposition of this claim was either contrary to federal law as determined by the Supreme Court or an application or interpretation of Supreme Court precedent "that reasonable jurists would all agree," *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998), was not " 'minimally consistent with the facts and circumstances of the case,' " *Wright*, 151 F.3d at 157 (quoting *Hennon*, 109 F.3d at 335).

B.

The Eighth Amendment requires that a capital jury be able to consider and give effect to all relevant mitigating evidence offered by the petitioner. *See Eddings v. Oklahoma*, 455 U.S. 104, 112-14, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Evidence about the petitioner's background and character is necessary for the sentencer "to make an individualized assessment of the appropriateness of the death penalty." *Penry v. Lynaugh*, 492 U.S. 302,

319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In determining the validity of a challenged instruction, the instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). In *Boyde*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316, the Supreme Court fleshed out these principles, holding that the proper inquiry in cases where a capital sentencing instruction allegedly prevents the consideration of mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380. Applying this rule to the petitioner's case in *Boyde*, the Supreme Court concluded that there was not a reasonable likelihood that the challenged instruction prevented the consideration of mitigating evidence, in light of the fact that the instruction told the jury that "you shall" consider "[a]ny other circumstance which extenuates the gravity of the crime" and that the jury was presented with four days of evidence at the penalty phase relating to Boyde's background and character. *Id.* at 381; *see id.* at 381-84.

Applying the *Boyde* inquiry in *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), the Supreme Court upheld the constitutionality of the Virginia pattern capital sentencing instruction, the very instruction at issue in this case, against a challenge on Eighth and Fourteenth Amendment grounds. The Supreme Court first noted that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. However, the State may shape and structure the jury's

consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan*, 118 S.Ct. at 761 (internal citations omitted). The Court further held, in pertinent part:

> The instruction did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on "all the evidence," the instruction afforded jurors an opportunity to consider mitigating evidence. The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they "may fix" the penalty at death, but directed that if they believed that all the evidence justified a lesser sentence then they "shall" impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved.

Id. at 762. The Supreme Court concluded that "[e]ven were we to entertain some doubt as to the clarity of the instructions," the two days of testimony related to mitigating evidence and the extensive arguments of the defense and the prosecution on the effect such evidence should be given in the sentencing determination demonstrated that there was "not a reasonable likelihood" that the instructions had precluded the jury's consideration of Buchanan's mitigating evidence in violation of *Boyde*. *Id.* at 762-63.

Given the Supreme Court's decision in *Buchanan*, Weeks is reduced to arguing that the trial court's failure to clarify a constitutionally sufficient instruction violated his Eighth and Fourteenth Amendment rights because the jury's question placed the trial court on notice that it was

reasonably likely that the jury would apply the instruction in a way that prevented the consideration of mitigating evidence. We find this argument to be without merit. Following the jury's finding of guilt on the capital murder charge, Weeks presented mitigating evidence as to his religious upbringing, the abrupt manner in which the events surrounding the shooting unfolded, and his feelings of remorse. Defense counsel argued extensively that the jury should give this mitigating evidence great weight in the sentencing determination. "[W]e think it unlikely that reasonable jurors would believe the court's instructions transformed all of this favorable testimony into a virtual charade." *Boyde*, 494 U.S. at 383 (internal quotation marks omitted). In fact, the verdict form the jury returned specifically noted that in fixing Weeks's punishment at death, the jury "considered the evidence in mitigation of the offense." (J.A. at 258, 1345-46.) At the conclusion of the penalty phase, following the announcement of the verdict in open court, each member of the jury was polled and confirmed the verdict.

Under these circumstances, we believe that no reasonable juror would have understood the sentencing instruction to preclude the consideration of mitigating evidence even upon a finding of an aggravating factor. The Supreme Court of Virginia's summary disposition of this claim, therefore, was neither contrary to federal law as interpreted by the Supreme Court of the United States nor an application or interpretation of *Boyde* "that reasonable jurists would all agree," *Green*, 143 F.3d at 870, was

not "minimally consistent with the facts and circumstances of the case," *Wright*, 151 F.3d at 157.[5]

IV.

Next, Weeks argues that the trial court's denial of his request for appointed ballistics and pathology experts violated his rights under the Fourteenth Amendment.[6] As support for his argument, Weeks cites the Supreme Court of Virginia's opinion in *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (Va.1996), *cert. denied*, 519 U.S. 1154, 117 S.Ct. 1092, 137 L.Ed.2d 225 (1997), decided one year after Weeks's conviction became final. In *Husske*, the Supreme Court of Virginia held that in certain instances, indigent defendants must be provided with non-psychiatric experts as part of the "basic tools of an adequate defense." *Id.* at 925.

A.

Prior to the trial, Weeks filed a motion for expert assistance in the fields of ballistics and pathology and, simultaneously, asked that his motion be treated pursuant

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[5] Even if we were to apply the pre-AEDPA standard of de novo review, *see Howard v. Moore*, 131 F.3d 399, 406 (4th Cir.1997) (en banc), *cert. denied*, ___ U.S. ___, 119 S.Ct. 108, 142 L.Ed.2d 86 (1998), we would conclude, for the reasons discussed, that the trial court's actions did not prevent the jury's consideration of mitigating evidence in violation of *Boyde*.

[6] Because Weeks frames this issue in his brief in terms of the fairness of the trial he received, we utilize a due process analysis in addressing his claim. *See Moore v. Kemp*, 809 F.2d 702, 709 n. 6 (11th Cir.1987) (en banc).

to 18 U.S.C.A. § 3006A(e) (West Supp.1998), which requires that an indigent's request for expert assistance in federal court be treated ex parte. Weeks contended that expert assistance was needed to evaluate the evidence and present a defense on the issues of premeditation in the guilt phase and vileness in the sentencing phase. Weeks contended that because he must demonstrate to the court why such expert assistance is required, the hearing on the motion should be ex parte to prevent the prosecution from learning the theory of the defense. After hearing argument of counsel, the trial court entered an order of September 28, 1993, denying both the motion and Weeks's request for an ex parte hearing on the motion.

On direct appeal, Weeks raised numerous assignments of error. In his 11th assignment of error, Weeks argued that the trial court erred by denying his application to be heard ex parte on his motion for expert assistance in the fields of pathology and ballistics. In his 12th assignment of error, Weeks argued that the trial court erred by denying his motion for expert assistance in the field of pathology and ballistics. The Supreme Court of Virginia declined to grant relief on either claim. *See Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (Va.1994).

The Commonwealth argues that the Supreme Court of Virginia's disposition of Weeks's 12th assignment of error, *i.e.*, his claim for appointment of experts, is not cognizable on federal habeas because it "reached no federal constitutional issue, for the simple reason that Weeks advanced no such claim." (Appellee's Br. at 16-17.) A federal court may grant habeas relief "only on the ground

that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a) (West 1994). Therefore, when a petitioner's claim rests solely upon an interpretation of state case law and statutes, it is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Moreover, a federal habeas court cannot hear a petitioner's federal claims unless he has first exhausted state remedies, *see* 28 U.S.C.A. § 2254(b), (c) (West 1994 & Supp.1998), which requires that the petitioner fairly present the substance of his federal claim to the state courts, *see Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam) (reversing grant of writ of habeas corpus where petitioner, on direct appeal in state court, claimed that evidentiary ruling violated state law but did not claim violation of any federal constitutional right).

Applying these principles to the facts of this case, we find the Commonwealth's argument unpersuasive. Although the Commonwealth correctly noted that the Supreme Court of Virginia did not discuss a federal constitutional issue in addressing Weeks's claim, it is the petitioner's argument to the court rather than the court's decision that is dispositive. Weeks's brief on direct appeal clearly alleged that the denial of expert assistance constituted violations of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States. Because Weeks presented the substance of a federal constitutional claim for experts to the Supreme Court of

Virginia, we may review this claim in a federal habeas proceeding.

B.

Weeks argues that the Supreme Court of Virginia never adjudicated the merits of his claim, and, therefore, this Court must review it de novo. Specifically, Weeks alleges that the Supreme Court of Virginia dismissed his application for an ex parte hearing on his motion for expert assistance in the fields of pathology and ballistics, the 11th assignment of error, without addressing his actual request for such expert assistance, the 12th assignment of error. With regard to these two assignments of error, the Supreme Court of Virginia found the following:

> Associated with defendant's claim of error relating to the request for a scientific investigation is the complaint that the trial court erred by denying his request to be heard ex parte on his motion for expert assistance in the fields of pathology and ballistics, and for denial of the request for appointment of such experts. Defendant asked that his motion for funding for expert assistance "be treated under the same procedure as required by Title 18 USC 3006A(e) in Federal Court." There is no merit to this contention.
>
> We already have decided that a defendant charged with capital murder is not entitled to an ex parte hearing on his motion for expert assistance. *Ramdass v. Commonwealth*, 246 Va. 413, 422, 437 S.E.2d 566, 571 (1993), *rev'd on other grounds sub nom. Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). In

> addition, we specifically have refused to apply the federal statute to state capital murder prosecutions.

Weeks, 450 S.E.2d at 388. Weeks's claim rests on the arguable point that when the Supreme Court of Virginia stated that "[t]here is no merit to this contention," the singular term "this contention" only referred to Weeks's application for an ex parte hearing and not to his claim for experts. Weeks's interpretation is supported by the preceding sentence, in which the Supreme Court of Virginia ruled that Weeks asked that his request for an ex parte hearing be treated under the same procedure as required by 18 U.S.C.A. § 3006A(e). Weeks's argument is also supported by the subsequent paragraph, in which the Supreme Court of Virginia exclusively discussed Weeks's application to be heard ex parte on his motion for expert assistance. The fact that the state court did not address a petitioner's federal constitutional claim does not render his claim unreviewable on federal habeas if he demonstrates that the state court had a fair opportunity to address the claim. *Cf. Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) (holding that a federal claim in a state court judgment on which the state court was silent will not be reviewed unless it was properly presented to the state court).

We agree with Weeks and conclude that the Supreme Court of Virginia failed to address his request for expert assistance in the fields of pathology and ballistics on the merits. Thus, we do not apply the standards of review set forth in 28 U.S.C.A. § 2254(d) (West Supp.1998), which requires that a claim be "adjudicated on the merits in State court proceedings." Because Weeks's request for

experts requires us to apply a legal standard to a given set of facts, we review his claim de novo.

C.

Even though Weeks's claim for expert assistance is not subject to 28 U.S.C.A. § 2254(d), we still must determine whether resolving Weeks's claim for experts in his favor would require this Court to announce a new rule in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). *See Green v. French*, 143 F.3d 865, 874 (4th Cir.1998) (holding that anti-retroactivity principles of *Teague* apply where limitations of § 2254(d)(1) do not). "Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions."[7] *Penry v. Lynaugh*, 492 U.S. 302, 313, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In general, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. "The principle announced in *Teague* serves to insure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S.Ct.

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[7] The two exceptions are new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," and "watershed rules of criminal procedure" that significantly improve the accuracy of the factfinding procedure and implicate the fundamental fairness of the trial. *See Teague v. Lane*, 489 U.S. 288, 311-12, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion).

2822, 111 L.Ed.2d 193 (1990). Thus, a petitioner cannot receive federal habeas relief "unless reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor." *Graham v. Collins*, 506 U.S. 461, 467, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (internal quotation marks omitted).

In determining whether a petitioner seeks a new rule on collateral review, a court should proceed in three steps:

> First, the date on which the defendant's conviction became final is determined. Next, the habeas court considers whether "a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by the existing precedent to conclude that the rule [he] seeks was required by the Constitution." If not, then the rule is new. If the rule is determined to be new, the final step in the *Teague* analysis requires the court to determine whether the rule nonetheless falls within one of the two narrow exceptions to the *Teague* doctrine.

O'Dell v. Netherland, 521 U.S. 151, 117 S.Ct. 1969, 1973, 138 L.Ed.2d 351 (1997) (internal citations omitted). Weeks's conviction became final on October 2, 1995, the date the Supreme Court of the United States denied certiorari. We therefore must determine whether as of October 2, 1995, a Virginia state court would have been compelled by existing precedent to conclude that a rule establishing a right to appointment of experts in pathology and ballistics for indigent criminal defendants was required by the Constitution.

Supreme Court precedent establishes the principle that the government, upon request, must provide indigent defendants with the "basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971); *see Douglas v. California*, 372 U.S. 353, 357-58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Griffin v. Illinois*, 351 U.S. 12, 18-19, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (plurality opinion). Although the government need not purchase for the indigent defendant all the assistance that a wealthier defendant might buy, fundamental fairness requires that indigent defendants have "an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).[8] In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held that as part of the basic tools of an adequate defense, an indigent defendant has a due process right to the appointment of a psychiatrist to assist him in his defense when he "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." *Id.* at 83. Although there was broad language in *Ake* suggesting application to a variety of circumstances in which an indigent defendant requests expert assistance, its precise holding was limited to the facts at hand. *See id.* at 83. In fact, the Supreme

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[8] Although most of the early Supreme Court decisions in the area of the treatment of indigents in the criminal justice system rested on an equal protection framework, "[d]ue process and equal protection principles converge in the Court's analysis in these cases." *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

Court soon thereafter declined to extend *Ake*'s holding to the appointment of a criminal investigator, fingerprint expert, and ballistics expert and declined to address the question of "what *if any* showing would [entitle] a defendant to [private non-psychiatric] assistance" as a matter of federal constitutional law. *Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (emphasis added).

We interpret *Ake* and *Caldwell* together to stand for the proposition that due process as of the time Weeks's conviction became final only required that an indigent defendant be appointed psychiatric experts when his sanity is at issue in the trial. Finding in favor of Weeks on his claim therefore would require us to announce a "new rule" of constitutional law in violation of *Teague*. Weeks cites *Husske*, 252 Va. 203, 476 S.E.2d 920, as support for his contention that he is not seeking the announcement of a new rule, but rather the application of an old rule. In *Husske*, the Supreme Court of Virginia noted the following:

> Our research reveals that most courts which have considered the question whether an indigent defendant is entitled to the appointment of a non-psychiatric expert have applied the rationale in *Ake*, and, those courts have held that the Due Process and Equal Protection clauses require the appointment of non-psychiatric experts to indigent defendants depending upon whether the defendants made a particularized showing of the need for the assistance of such experts.

Id. at 925 (citing numerous cases from state and federal courts). The Supreme Court of Virginia continued, "We

are of the opinion that *Ake* and *Caldwell*, when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with 'the basic tools of an adequate defense,' and, that in certain instances, these basic tools may include the appointment of non-psychiatric experts." *Id.* (internal citation omitted). The Supreme Court of Virginia then held that an indigent defendant may establish an entitlement to appointment of a non-psychiatric expert "by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." *Id.*

Weeks argues that although the *Husske* decision came out one year after his conviction became final, it provides a good proxy of what the Supreme Court of Virginia would have concluded had it addressed the issue in Weeks's case, and, therefore, application of the *Husske* rule to his case would not involve the application of a "new rule." *See Lambrix v. Singletary*, 520 U.S. 518, 117 S.Ct. 1517, 1529, 137 L.Ed.2d 771 (1997) (holding that case was a "particularly good proxy" for what a reasonable jurist would have thought four years previously, given that the only relevant cases decided in interim were dictated by precedent). We find Weeks's argument to be unpersuasive. The proper inquiry under *Teague* is whether the Supreme Court of Virginia would have been *compelled* by existing precedent at the time that Weeks's conviction became final to hold that Weeks was constitutionally entitled to the appointment of experts in pathology and ballistics, not whether the Supreme Court of Virginia would later be convinced after canvassing cases from other courts that such experts may be required in

certain instances. Weeks points to no controlling precedent between *Ake/Caldwell* and *Husske* that would compel the Supreme Court of Virginia to rule in his favor. Neither the mere fact that prior cases lent general support to the conclusion reached in *Husske*, nor Weeks's contention that the Supreme Court of Virginia would have felt compelled (by existing precedent at the time that Weeks's conviction became final) to conclude that the rule he seeks was required by the Constitution, suffices to show that *Husske* was not a new rule. *See Sawyer*, 497 U.S. at 236.

In fact, we have recently indicated that the *Husske* rule is not required by *Ake* and *Caldwell*. In *Gray v. Thompson*, 58 F.3d 59 (4th Cir.1995), this Court considered a habeas petitioner's claim that the Virginia state court's refusal to appoint a private investigator for the defense violated due process. *See id.* at 66. Citing *Caldwell*, we noted that the Supreme Court had flatly declined to resolve the question of what, if any, showing would entitle an indigent defendant to private non-psychiatric assistance as a matter of federal constitutional law. *See id.* We then concluded that resolving that question "would clearly be breaking new constitutional ground." *Id.* at 66; *see also Jackson v. Ylst*, 921 F.2d 882, 885-86 (9th Cir.1990) (declining to address same question). We see no reason why the holding in *Gray* does not apply to a claim based on a denial of experts in pathology and ballistics. Weeks therefore is requesting this Court to apply the new rule established by *Husske* to this case.

D.

Because Weeks claims the benefit of a new rule, the rule is not applicable to his case unless it falls within one of two narrow exceptions enunciated in *Teague*. Weeks argues that even if *Husske* was a new rule, his request falls under the second exception, which allows retroactive application of a "watershed rule of criminal procedure" that significantly improves the fact finding procedures and implicates the fundamental fairness of the trial. *See Teague*, 489 U.S. at 311. Weeks contends that in light of *Ake* and *Caldwell* it would be fundamentally unfair to conclude that psychiatrists are a basic tool of an adequate defense while non-psychiatric experts are not. In support of his argument, Weeks cites numerous cases in which this Court and others have recognized that due process may entitle an indigent defendant to receive the services of court-appointed independent non-psychiatric experts on request.

We find Weeks's argument to be unpersuasive. Because the second *Teague* exception is directed toward the accurate determination of guilt or innocence, it is "unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. This Court has recognized that an indigent defendant has a right under the due process clause to the assistance of an expert if a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance. *See Williams v. Martin*, 618 F.2d 1021, 1027 (4th Cir.1980). *Williams* concerned the refusal of the trial court to furnish the defendant with an independent pathologist to serve as an expert witness concerning

the cause of the victim's death. *See id.* at 1026. Because there is no doubt as to the cause of Trooper Cavazos's death, we believe that Weeks's claim does not present the "substantial issue" necessary to invoke the *Williams* rule. *See George v. Angelone*, 901 F.Supp. 1070, 1084-85 & n. 8 (E.D.Va.1995) (following *Gray* and holding that petitioner is not entitled as a matter of due process to private investigator to assist defense in countering Government's "vileness" case at sentencing phase). Moreover, because the *Husske* rule recognizing a federal constitutional right to non-psychiatric experts in Virginia state cases upon a particularized showing of such need adds to an existing guarantee of due process, it is not an "absolute prerequisite to fundamental fairness" of the type required by *Teague*'s second exception. *Sawyer*, 497 U.S. at 244.

In sum, we hold that although Weeks's claim for experts in pathology and ballistics was not adjudicated by the state courts, finding a federal constitutional right to such experts upon a particularized showing of need would require us to apply a "new rule" in violation of *Teague*.[9]

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[9] The relevant standard of review under the AEDPA is even more stringent than *Teague*, because under the AEDPA, a writ will not issue unless a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States.*" 28 U.S.C.A. § 2254(d) (West Supp.1998) (emphasis added). It necessarily follows that if a decision resolving this claim in Weeks's favor is impermissible under *Teague*, such a decision is also impermissible under § 2254(d).

V.

Weeks also argues that the trial court violated his Fifth Amendment right against self-incrimination by refusing to suppress the confession he made to Agent Rowland at the second interrogation. Specifically, Weeks alleges that Agent Rowland's second interrogation failed to "scrupulously honor" Weeks's right to cut off questioning in violation of *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Furthermore, Weeks claims that the constitutional error of introducing his statements made at the second interrogation had a "substantial and injurious effect or influence in determining the jury's verdict." (Appellant's Br. at 24-25.)

The relevant circumstances surrounding Weeks's confession are as follows. At 7:40 a.m. on February 24, 1993, Weeks was read his *Miranda* rights by Agent Rowland, who had become suspicious of him during their conversation. Weeks invoked his right to remain silent and questioning immediately ceased. Upon learning several minutes later that the driver of the car in which Weeks was traveling had identified Weeks as the shooter of Trooper Cavazos, Rowland placed Weeks under arrest. Weeks was then taken before a magistrate and then to the Adult Classification Center in Manassas. Later that morning, in response to routine questions about his physical and mental state from classification officers in the jail, Weeks indicated that he was considering suicide because he had shot the trooper. At approximately 6:00 p.m., Weeks was brought to the lounge of the local prosecutor's office where Rowland again interviewed him. Rowland asked Weeks whether he remembered the rights Rowland had read to him earlier in the day and Weeks answered

affirmatively. Rowland proceeded to summarize the evidence against Weeks. At the end of his summary, Rowland told Weeks, "This is your opportunity to provide your explanation as to what happened at the shooting scene." *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 385 (1994). Weeks replied that he was "packing" a firearm and then confessed to Trooper Cavazos's murder.

In *Mosley*, the Supreme Court addressed an issue left open by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) – the circumstances, if any, under which resumption of questioning is permissible after a person in custody has indicated that he wishes to remain silent. *See Mosley*, 423 U.S. at 100-02. Rejecting an interpretation of *Miranda* that would "create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent," *id.* at 102-03, the Supreme Court concluded "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored,' " *id.* at 104. The Supreme Court set forth the following list of factors for a court to consider in making this inquiry: (1) whether the police had given the suspect *Miranda* warnings at the first interrogation and the suspect acknowledged that he understood the warnings; (2) whether the police immediately ceased the interrogation when the suspect indicated that he did not want to answer questions; (3) whether the police resumed questioning the suspect only after the passage of a significant period of time; (4) whether the police provided a

fresh set of *Miranda* warnings before the second interrogation; and (5) whether the second interrogation was restricted to a crime that had not been a subject of the earlier interrogation. *See id.* at 104-07.

Weeks argues that his second interrogation was in violation of *Mosley* because his interrogators violated three of the *Mosley* factors: a significant amount of time had not passed between interrogations, no new *Miranda* warnings were given, and the second interrogation concerned the same crime that was the subject of the first interrogation. Insofar as Weeks suggests that the failure to satisfy certain factors is dispositive of whether a *Mosley* violation has occurred, we disagree. *Mosley* does not prescribe a bright-line test to determine whether a suspect's right to cut off questioning was "scrupulously honored." Instead, the touchstone is whether a "review of the circumstances" leading up to the suspect's confession reveals that his "right to cut off questioning was fully respected." *Mosley*, 423 U.S. at 104; *see also United States v. Schwensow*, 151 F.3d 650, 659 (7th Cir.1998); *United States v. Alvarado-Saldivar*, 62 F.3d 697, 699 (5th Cir.1995).

Applying the *Mosley* factors to Weeks's case, we cannot conclude that the Supreme Court of Virginia's decision to uphold the trial court's admission of Weeks's confession was contrary to or an unreasonable application of *Mosley*. The first factor in the *Mosley* analysis is whether the suspect was advised before the initial interrogation that he had the right to remain silent. The second factor is whether there was an immediate stoppage of questioning once the suspect asserted his right to remain silent. In this case, it is undisputed that Weeks

received full *Miranda* warnings during his first interrogation by Agent Rowland and that questioning ceased immediately once Weeks invoked his right to cut off questioning.

The third factor in the *Mosley* analysis is whether the police waited a significant period of time after the suspect's initial invocation of his right to remain silent before questioning the suspect again. A significant period of time between interrogations does not require a durational minimum. *Compare United States v. Cody*, 114 F.3d 772, 775-76 (8th Cir.1997) (holding that three hours was significant amount of time) *with United States v. Barone*, 968 F.2d 1378, 1385 (1st Cir.1992) (holding that more than twenty-four hours was insufficient where police repeatedly pressured suspect to cooperate). Instead, a "significant period of time" is a function of to what degree the police "persist[ed] in repeated efforts to wear down [the suspect's] resistance and make him change his mind." *Mosley*, 423 U.S. at 105-06. In this case, over ten hours passed between the time when Weeks invoked his right to cut off questioning and the second interrogation, during which time Weeks was asked routine questions about his physical and mental state but was not subjected to repeated efforts to wear down his resistance. It was reasonable for the Supreme Court of Virginia to conclude that this period of time was sufficient. *See Mosley*, 423 U.S. at 104-06 (considering two hours to be a "significant period of time").

The fourth factor in the *Mosley* analysis is whether the suspect received a fresh set of *Miranda* warnings prior to the second interrogation. In this case, Agent Rowland admittedly did not reinform Weeks of his right to remain

silent prior to the second interrogation. Agent Rowland did, however, ask Weeks whether he remembered the rights he had been read from the first interrogation, and Weeks responded that he did. Weeks then proceeded to confess voluntarily to the trooper's murder. The fact that incomplete *Miranda* warnings, or no warnings at all, are given prior to the second interrogation is not decisive. *See, e.g., United States v. Andrade*, 135 F.3d 104, 106-07 (1st Cir.1998) (finding no *Mosley* violation where officer asked suspect whether he remembered rights that were read to him earlier and suspect answered in affirmative); *Kelly v. Lynaugh*, 862 F.2d 1126, 1131 (5th Cir.1988) (finding that failure to give new *Miranda* warnings did not establish *Mosley* violation because in light of two oral warnings and one written warning given earlier, it would be difficult to conclude that suspect had forgotten his *Miranda* rights); *Stumes v. Solem*, 752 F.2d 317, 319-22 (8th Cir.1985) (finding that failure to give new *Miranda* warnings did not establish *Mosley* violation because suspect's conduct indicated that he was aware of his *Miranda* rights). This principle is particularly apt here, as Weeks apparently was aware of his *Miranda* rights and voluntarily chose not to exercise them. *See Andrade*, 135 F.3d at 106-07; *Stumes*, 752 F.2d at 321. The fact that Weeks spoke to an officer to whom he had previously asserted his right to cut off questioning further indicates that he was comfortable in exercising this right and that his decision not to exercise this right was the product of volition rather than of coercion.

The fifth factor in the *Mosley* analysis is whether the second interrogation concerned a crime that was the subject of the first interrogation. In this case, both interrogations concerned the same crime – the murder of Trooper Cavazos. Where other factors indicate that a defendant's right to cut off questioning was "scrupulously honored," however, the mere fact that a second interrogation involves the same crime as the first interrogation does not necessarily render a confession derived from the second interrogation unconstitutionally invalid under *Mosley*. *See, e.g., Schwensow,* 151 F.3d at 659 ("[T]he constitutionality of a subsequent police interview depends not on its subject matter but rather on whether the police, in conducting the interview, sought to undermine the suspect's resolve to remain silent."); *Hatley v. Lockhart,* 990 F.2d 1070, 1074 (8th Cir.1993) ("[A] second interrogation is not rendered unconstitutional simply because it involves the same subject matter discussed during the first interview."); *United States v. Hsu,* 852 F.2d 407, 410 (9th Cir.1988) (noting that under flexible *Mosley* approach, "an identity of subject matter in the first and second interrogations is not sufficient, in and of itself, to render the second interrogation unconstitutional").

In sum, under the totality of the circumstances, it was reasonable for the Supreme Court of Virginia to conclude that the police "scrupulously honored" Weeks's right to cut off questioning. The record before us clearly demonstrates that the Supreme Court of Virginia's decision upholding the trial court's admission of Weeks's confession derived from the second interrogation was neither contrary to *Mosley* nor an application or interpretation of *Mosley* "that reasonable jurists would all agree [wa]s

unreasonable." *Green v. French,* 143 F.3d 865, 870 (4th Cir.1998).[10]

VI.

Next, Weeks argues that the district court erred in holding that several of his claims were procedurally defaulted. Under the well-established doctrine of procedural default, a federal habeas court may not review a claim that a state court has found to be clearly and expressly defaulted under an independent and adequate state procedural rule unless the prisoner can demonstrate cause for the default and prejudice resulting therefrom or demonstrate that a failure to consider the claims will result in a fundamental miscarriage of justice.[11] *See*

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[10] Even if we were to apply the pre-AEDPA standard of de novo review, *see Howard v. Moore,* 131 F.3d 399, 406 (4th Cir.1997) (en banc), *cert. denied,* ___ U.S. ___, 119 S.Ct. 108, 142 L.Ed.2d 86 (1998), we would conclude, for the reasons discussed, that Weeks has failed to show that the police did not "scrupulously honor" his right to cut off questioning under *Mosley*.

[11] Under the "miscarriage of justice" doctrine, a writ may be granted even without a showing of cause if a constitutional violation has probably resulted in the conviction of someone who is actually innocent. *See Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397(1986). In a capital case, to show "actual innocence" of the death penalty, a petitioner must show by clear and convincing evidence that but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. *See Sawyer v. Whitley,* 505 U.S. 333, 348, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Before this Court, Weeks has not argued that our refusal to address his procedurally defaulted claims would result in a "miscarriage of justice." Accordingly, we do not address the "miscarriage of justice" exception.

Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). A state rule is adequate if it is "firmly established," *James v. Kentucky*, 466 U.S. 341, 348, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984), and regularly and consistently applied by the state court, *see Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), and is independent if it does not "depend[ ] on a federal constitutional ruling," *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

A.

First, Weeks asserts that the district court erred when it determined that Claims IV and XXIV were procedurally defaulted. On direct appeal, the Supreme Court of Virginia ruled that it would not address Weeks's assignment of errors 10 and 36 because Weeks failed to register these objections at trial as required by Rule 5:25 of the Rules of the Supreme Court of Virginia.[12] *Weeks v. Commonwealth*, 450 S.E.2d 379, 388, 389 (Va.1994). Weeks subsequently raised these objections in his federal habeas petition as Claims IV and XXIV. The district court found these claims to be procedurally defaulted under Rule 5:25. *Weeks v. Angelone*, 4 F.Supp.2d 497, 515 (E.D.Va.1998).

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[12] Rule 5:25 provides: "Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Va. Sup.Ct. R. 5:25 (Michie 1998).

Weeks does not dispute that these claims are procedurally defaulted under Rule 5:25, but he now argues that Rule 5:25 is not an adequate state procedural bar because it is not regularly and consistently applied by the Virginia state courts. As support for this contention, Weeks cites several Virginia state cases that allegedly demonstrate that Virginia courts have often strayed from the contemporaneous objection rule.

We find this argument to be without merit. As a general matter, an unambiguous court rule such as Rule 5:25 is necessarily "firmly established." *See O'Dell v. Netherland*, 95 F.3d 1214, 1241 (4th Cir.1996) (en banc). Moreover, contrary to Weeks's assertion on appeal, the Supreme Court of Virginia has regularly and consistently applied Rule 5:25 in recent years. *See, e.g., Fairfax Hosp. v. Curtis*, 492 S.E.2d 642, 648 (Va.1997); *Angstadt v. Atlantic Mut. Ins. Co.*, 492 S.E.2d 118, 121 (Va.1997); *Hughes v. Cole*, 251 Va. 3, 465 S.E.2d 820, 831 (Va.1996); *see also Bennett v. Angelone*, 92 F.3d 1336, 1345 n. 7 (4th Cir.1996) ("Normally, the Virginia Supreme Court will not review errors not preserved by contemporaneous objection."). The mere recitation of a few cases in which the Supreme Court of Virginia has not applied Rule 5:25 is insufficient to show that Rule 5:25 is not consistently or regularly applied because "[c]onsistent or regular application of a state rule of procedural default does not require that the state court show an undeviating adherence to such rule admitting of *no* exception, when the state procedural rule has, as a general rule, . . . been applied in the vast majority of cases." *Yeatts v. Angelone*, 166 F.3d 255, 263-64 (4th Cir.1999) (internal quotation marks and citations omitted); *accord Smith v. Dixon*, 14 F.3d 956, 972 (4th Cir.1994).

Weeks therefore fails to establish that Rule 5:25 is not an independent and adequate state procedural bar precluding review of errors he did not raise at trial.

B.

Next, Weeks claims that the district court erred when it determined that Claims II, III, VI, VIII, XVII, XXI, and XXIII were procedurally defaulted. On direct appeal, Weeks filed a ninety-page brief that raised forty-seven errors. He moved for leave to file an oversized brief pursuant to Rule 5:26. The Supreme Court of Virginia denied Weeks's motion and ordered him to file a fifty-page brief.[13] Due to the space limitation, Weeks deleted the arguments supporting ten claims of federal constitutional error. The Supreme Court of Virginia refused to consider these ten claims (nos. 4, 5, 6, 7, 8, 17, 26, 31, 38, and 39) for failure to brief or argue the errors. *Weeks*, 450 S.E.2d at 383 (citing *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360, 364 (1992)). Weeks subsequently raised seven of these claims in his federal habeas petition as Claims II, III, VI, VIII, XVII, XXI, and XXIII. The district court found these claims to be procedurally defaulted for failure to brief them on direct appeal. *Weeks*, 4 F.Supp.2d at 515-17.

Weeks now argues that the state rule preventing consideration of claims not briefed on direct appeal does not

[13] Rule 5:26(a) provides: "Except by permission of a justice of this Court, neither the opening brief of appellant, nor the brief of appellee, nor a brief amicus curiae shall exceed 50 typed or 36 printed pages." Va.Sup.Ct. R. 5:26(a) (Michie 1998).

constitute an adequate and independent state bar because the fifty-page limitation physically prevented him from presenting these claims. In the alternative, Weeks argues that even if the rule is an adequate and independent state procedural bar, he has shown cause and prejudice to overcome the bar because the Supreme Court of Virginia's refusal to deviate from its fifty-page limit even when it was on notice that Weeks needed more than fifty pages to present his arguments was an "objective factor external to the defense" that impeded Weeks's ability to comply with the state procedural rule. Weeks also argues that by proffering the defaulted claims in his original oversized brief, he satisfied the exhaustion requirement for the purposes of federal proceedings and that further presentation of these claims was not required because the fifty-page limitation rendered the state appellate process ineffective to protect his rights. We address these arguments in turn.

1.

First, Weeks argues that the state procedural bar preventing consideration of claims not briefed on direct appeal was not adequate and independent because the fifty-page brief limit physically prevented him from presenting all forty-seven assigned errors to the Supreme Court of Virginia. In support of this argument, Weeks cites *Reese v. Peters*, 926 F.2d 668 (7th Cir.1991). In *Reese*, state law prevented the petitioner from raising several claims in post-conviction proceedings in state court. *See id.* at 670. On federal habeas review, the district court deemed these claims to be forfeited. *See id.* The Seventh Circuit stated that "[w]hen state law does not allow the

prisoner to present a particular claim, the omission – submitting to limitations established by law – is not an independent and adequate state ground precluding federal review." *Id.* The Seventh Circuit concluded, however, that because the petitioner did not present the claims on direct appeal from his conviction, he forfeited the claims on collateral review. *See id.* at 671.

Reese cuts against Weeks's argument rather than supporting it. Much like the petitioner in *Reese*, Weeks voluntarily withdrew the arguments supporting several claims on direct appeal. The fifty-page limit merely limited the manner in which Weeks could present his arguments; it did not wholly prevent him from presenting them. Moreover, the Supreme Court of Virginia has regularly and consistently refused to consider claims not briefed or argued on direct appeal. *See, e.g., Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380, 385 (1992); *Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218, 222 (1991); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385, 390 (1990). The state procedural rule that deems arguments not briefed to be waived is therefore an adequate and independent state bar.

2.

Second, Weeks argues that even if the state procedural bar was adequate and independent, cause and prejudice existed for his default. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S.

478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Weeks argues that the fifty-page limit imposed by the Supreme Court of Virginia was itself an "objective factor external to the defense" that impeded his effort to comply with the state procedural rule.

We find this argument unpersuasive. While the page limitation may have led Weeks's counsel to make certain strategic choices as to which arguments to include and which to omit, the page limitation is reasonable.[14] It would be nonsensical to hold that the fifty-page limit, which is itself a reasonable and consistently applied state procedural rule, could constitute cause for failure to adhere to another state procedural rule that deems issues not briefed on direct appeal to be waived. The fifty-page limit therefore did not constitute cause for Weeks's failure to comply with the state procedural rule requiring litigants to brief issues on appeal in order to preserve them.

3.

Finally, Weeks argues that by presenting the defaulted claims in his original oversized brief, he satisfied the exhaustion requirement for purposes of federal proceedings. Weeks also argues that further presentation of these claims was not required because circumstances existed that rendered the state appellate process ineffective to protect his rights. *See* 28 U.S.C.A. § 2254(b)(1)(B)(ii) (West Supp.1998). It appears that Weeks

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[14] The United States Supreme Court limits opening briefs to 50 pages. *See* U.S. S.Ct. R. 33.1(g).

is conflating the related concepts of exhaustion and procedural default.[15] Both parties, the district court, and we agree that Weeks's claims have been exhausted. The issue, however, is whether these claims are defaulted by Weeks's failure to brief them on direct appeal, and, if so, whether there is cause for and prejudice resulting from Weeks's default. As we concluded above, the state rule preventing consideration of claims not briefed on direct appeal is an adequate and independent state bar, and the fifty-page limit does not constitute cause for defaulted claims not presented on appeal. Weeks therefore fails to show that the state procedural rule barring review of claims not briefed on appeal is not an adequate and independent state bar precluding review of the claims he chose not to present to the Supreme Court of Virginia in his fifty-page brief.

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[15] "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997). "A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture." *George v. Angelone*, 100 F.3d 353, 363 (4th Cir.1996). Thus, the exhaustion requirement is also satisfied when a state procedural rule would bar consideration of the unexhausted claim if the claim was presented to the state court. *See Matthews*, 105 F.3d at 911 (citing *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). A claim is procedurally defaulted when it is rejected by a state court on an adequate and independent state procedural ground. *See Coleman*, 501 U.S. at 750.

C.

Finally, Weeks claims that the district court erred when it determined that his ineffective-assistance-of-trial-counsel claims were procedurally defaulted. As of July 1, 1995, prisoners under a sentence of death were required to comply with a statute of limitations for filing a habeas petition and were limited to filing an original petition in the Supreme Court of Virginia. *See* Va.Code Ann. § 8.01-654.1 (Michie Supp.1998); Va. Sup.Ct. R. 5:7A(a) (Michie 1998).[16] (J.A. at 517-20). Weeks's state habeas counsel erroneously filed Weeks's habeas petition in the Circuit Court for Prince William County. On December 1, 1995, the date on which Weeks's state habeas petition was due in the Supreme Court of Virginia, habeas counsel withdrew the petition and mailed it to the Supreme Court of Virginia by regular mail. The Supreme Court of Virginia received the petition on December 4, 1995.[17] On

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[16] Section 8.01-654.1 provides: "No petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after . . . denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal." Va.Code. Ann. § 8.01-654.1 (Michie Supp.1998). Rule 5:7A(a) provides: "A petition for a writ of habeas corpus shall be filed in the office of the clerk of this Court within 60 days after . . . the denial by the Supreme Court of the United States of a petition for a writ of certiorari to the judgment of this Court on direct appeal." Va. Sup.Ct. R. 5:7A(a) (Michie 1998).

[17] Had Weeks's state habeas petition been mailed by registered or certified mail, rather than by ordinary mail, it would have been deemed timely. *See* Va. Sup.Ct. R. 5:5(b) (Michie 1998).

March 15, 1996, the Supreme Court of Virginia granted the Commonwealth's motion to dismiss Weeks's petition as untimely, and, therefore, jurisdictionally barred. The district court found Weeks's ineffective-assistance-of-trial-counsel claims to be procedurally defaulted due to the untimely filing of his state habeas petition. *Weeks*, 4 F.Supp.2d at 510-11.

In Virginia, claims of ineffective assistance of trial counsel generally must be presented on collateral review rather than direct appeal. *See Roach v. Commonwealth*, 251 Va. 324, 468 S.E.2d 98, 105 n. 4 (1996). Weeks does not dispute that the untimely filing of his state habeas petition constitutes an independent and adequate state bar to the consideration of his ineffective-assistance-of-trial-counsel claims on federal habeas, but he now argues that cause and prejudice exist to excuse his defaults. Specifically, Weeks alleges that the defaults resulted from the clear conflict of interest under which his court-appointed state habeas attorney labored: the attorney had previously represented at trial another capital defendant, who was subsequently represented on state habeas by Weeks's former trial attorney. As support for his contention that such a conflict constitutes "cause," Weeks cites Legal Ethics Opinion (LEO) No. 1665, issued on April 1, 1996, by the Virginia State Bar, which condemned such "cross appointments" because each counsel "was expected to zealously advocate petitioner's claims of ineffective assistance of counsel . . . while simultaneously defending himself against substantially similar claims."

Ineffective assistance of counsel may constitute "cause" for a procedural default under certain circumstances. *Murray*, 477 U.S. at 488. For an attorney error to

constitute cause, however, a petitioner must first possess a constitutional right to assistance of counsel. *See Coleman*, 501 U.S. at 752. This Court has recently held that a petitioner has no constitutional right to assistance of counsel in state habeas proceedings, even though claims of ineffective assistance of trial counsel can only be raised on state collateral review. *See Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir.1997) (en banc), *cert. denied*, ___ U.S. ___, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998). In an attempt to avoid the binding precedent of *Mackall*, Weeks argues that he possesses a liberty interest in conflict-free habeas representation that is protected under the due process clause of the Fourteenth Amendment based on his statutory right to counsel under Va.Code Ann. § 19.2-163.7 (Michie 1995).[18] Weeks further contends that the actions of his conflicted state habeas counsel in failing to observe the jurisdictional rules in filing his state habeas petition and in failing to withdraw after the Virginia State Bar issued LEO No. 1665, and of the state courts in appointing conflicted counsel, constituted violations of his due process rights.

Although Weeks characterizes the conduct of his state habeas counsel as "outrageous," at the district court level he relied on the same set of facts in making his Sixth Amendment claim of ineffective assistance of habeas counsel as his Fourteenth Amendment due process claim.

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[18] Section 19.2-163.7 of the Virginia Code provides that following the affirmance of a death sentence on appeal to the Supreme Court of Virginia, the circuit court shall appoint counsel to represent an indigent prisoner in a state habeas proceeding. *See* Va.Code Ann. § 19.2-163.7 (Michie 1995).

We thus view his argument as an attempt to shoehorn a claim of ineffective assistance of counsel into a due process claim. We agree with the Ninth Circuit's reasoning in *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir.1996), which denied a due process claim nearly identical to Weeks's:

> [The petitioner] essentially argues that the Fourteenth Amendment violation is his ineffective assistance of counsel. . . . [W]e now hold that ineffective assistance of counsel in habeas corpus proceedings does not present an independent violation of the Sixth Amendment enforceable against the states through the Due Process Clause of the Fourteenth Amendment. To recognize such a claim would allow the Fourteenth Amendment to "swallow the rule" that there is no constitutional right to effective assistance of counsel in habeas corpus proceedings.

Id. at 1160; *see also Smith v. Angelone*, 111 F.3d 1126, 1133 n. 4 (4th Cir.1997) ("We have never held that a prisoner may claim a due process violation based upon his lawyer's performance on state habeas. . . . "), *cert. denied*, 521 U.S. 1131, 118 S.Ct. 2, 138 L.Ed.2d 1036 (1997). Under the persuasive reasoning of *Bonin*, a petitioner may claim a due process violation occurring in his state habeas proceeding, but he may not premise this claim solely on the alleged ineffective assistance of state habeas counsel. Because Weeks's due process claim is the same as his claim of ineffective assistance of habeas counsel and this Court does not recognize a constitutional right to counsel on state habeas, the alleged ineffective assistance of habeas counsel cannot constitute cause to excuse Weeks's defaulted ineffective-assistance-of-trial-counsel claims.

VII.

In conclusion, for the reasons discussed above, we hold that Weeks has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253(c)(2) (West Supp.1998). We therefore deny his application for a certificate of appealability and dismiss his petition.

DISMISSED.

Supreme Court of the United States

***No.* 99-5746**

LONNIE WEEKS, JR.,

Petitioner

v.

RONALD J. ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

September 1, 1999